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OIL AND GAS DIVISION ORDERS
William N. Ethridge, Jr.

LEGAL CONSEQUENCES OF THE INTERSTATE NATURAL GAS COMPANY DECISION AND RELATED CASES
Donald C. McCreery

PROXIMATE CAUSES AND EFFECTS
W. W. Venable

March, 1948

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OIL AND GAS DIVISION ORDERS

*William N. Ethridge, Jr.**

During the few decades of their existence, the oil and gas industries in America have made vast strides in the production and marketing of their products. In this respect, they have paralleled the automobile business. Moreover, vast aggregates of capital have developed these functions to the point where they are among the largest industries in the nation.

The numerous contractual relationships necessarily involved have resulted in a plethora of legal problems requiring clarification and solution. Their volume is certainly as large as that of the law of insurance and of automobiles. Oil and gas law today is in the period of development that the law merchant was at the time of Lord Mansfield. Although in theory it is coextensive with basic legal principles of contracts, torts and sales, in practice the industry has adapted the forms of its business transactions to its own singular needs. The courts have found that they must adjust their rationale and their decisions to the often unusual concepts and relationships of those who are interested in petroleum, natural gas, and resulting by-products—landowners, royalty owners, lessees, and distributing purchasers.

The oil or gas division order (a singular type of offer to sell) is perhaps as important in the petroleum and gas industries as the oil, gas and mineral lease, yet, strangely enough, the factual and legal implications and effects of the former have never been analyzed to any extent. As the lease is the contractual prerequisite of production, so the division order is the basis of marketing and distribution.

I. Nature of the Obligation

The usual oil, gas and mineral lease provides for the delivery of the lessor's royalty oil to a pipe line to the credit of the lessor, or, in the alternative, for delivery at the well in storage furnished by lessor at his expense. Under such terms the lessee would seem to have apparent

*Wells, Wells, Newman and Thomas, Jackson, Miss.; A.B., LL.B., Univ. of Miss.; LL.M., Univ. of So. California; former Assistant Professor of Law, Univ. of Miss.; former Chairman of Junior Bar Section of Miss. State Bar; National Director, Procedural Reform Studies of Junior Bar Conference of Am. Bar Ass'n.

authority to make delivery of the royalty oil.[1] In any event the lessee has either an express or implied duty to market the production.[2]

Some leases fail to state the general basis of the price lessor shall receive for his share of the production. Where this omission exists, the need for a contract between the royalty owners and the pipe line company which is purchasing the royalty is manifest. However, the lease form in most common use today provides that lessee may from time to time purchase any royalty oil in its possession by paying the owners the market price prevailing on the date of the purchase for the field where the oil is produced. Many leases also state that if no such posted price is established, the oil may be sold for the price for which lessee sells its share of such oil, less lessor's proportionate part of the cost of treating, gathering, storing and transporting such oil to the point of sale.[3]

The lessee ordinarily executes a contract of sale of the output of the well with the operator of a pipe line.[4] Even though the price of the oil or gas is fixed by the lease itself, and the lessee is the agent of the royalty owners in selling and delivering the oil owned by the royalty owners, it is customary for the pipe line company or other purchaser of the oil run, after examination of title, to require the lessee to furnish it with a "division order" executed by all persons having an interest in the production. This is necessary because the purchaser is liable to the owners for it and has the duty to discover the ownership of it.[5] This division order is designed, therefore, to accomplish about six major objectives:

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[1]So. Oil Corp. v. Waggoner, 276 Fed. 487 (C.C.A. 5th 1921); Elliott, Jones and Co. v. Waurika Oil Ass'n., 253 S.W. 601 (Tex. Civ. App. 1923).

Reference herein to "oil" or "gas" includes either or both products, unless the context indicates differently.

[2]2 SUMMERS, OIL AND GAS §§ 412, 415, 416 (2d perm. ed. 1939); 2 *Ibid,* § 590, pp. 426-427. Waiver of duty to market by lessor's refusal to sign division order: Corrigan v. Shell Petroleum Corp., 62 S.W.(2d) 663 (Tex. Civ. App. 1933); see Texas Co. v. Beall, 3 S.W.(2d) 524 (Tex. Civ. App. 1927).

[3]For typical forms of such leases, see 7 SUMMERS, OIL AND GAS (2d perm. ed. 1939) §§ 1121-1311; BENOIT, OIL AND GAS FORMS pp. 5-144 (2d ed., Oakes, 1939); THUSS, TEXAS OIL AND GAS pp. 453-492 (2d ed. 1935).

[4]For typical forms of such contracts of sale by operating lessees, see 7 SUMMERS, OIL AND GAS §§ 1561-1570 (2d perm. ed. 1939); THUSS, TEXAS OIL AND GAS p. 546; (2d ed. 1935) BENOIT, OIL AND GAS FORMS, pp. 512-544 (2d ed., Oakes. 1939).

[5]Shreveport-El Dorado Pipe Line Co. v. Bennett, 172 Ark. 804, 290 S.W. 929 (1927); Texas Co. v. Pettit, 107 Okla. 243, 220 Pac. 956, 231 Pac. 463 (1923); Hughes v. United Pipe Line Co., 119 N. Y. 423, 23 N.E. 1042 (1890); Enterprise Oil and Gas Co. v. National Transit Co., 172 Pa. 421, 33 Atl. 687 (1896); Smith v. Linden Oil Co., 69 W.Va. 57, 71 S.E. 167 (1911) (injunction and accounting); Transcontinental Oil Co. v. Mid Kansas Oil and Gas Co., 29 F.(2d) 323 (C.C.A. 5th 1928), *cert. denied* 279 U.S. 853 (1928).

(1) Constitute a warranty of title by the owners and sellers, stating the share of each;

(2) Constitute a contract to sell the oil or gas purchased as soon as the same is taken into the custody of the pipe line company or other purchaser;

(3) Fix the price;

(4) Provide for a time and method of payment;

(5) Provide that satisfactory evidence of title or indemnity from loss must be furnished purchaser before payment is made; and

(6) Provide for notice to the purchaser of changes and transfers in the agreed proportional interests before purchaser must change its method and division of payment.

Because this type of instrument may be comparatively unfamiliar to most readers, a typical form is printed in the footnote.[6] The reader should study this form before proceeding further in this discussion.

What are the legal relations between the signers of a division order and the company to whom it is directed, what is its general nature, and what are its practical effects?

---

[6]DIVISION ORDER

Contract No._____

TO _____ Effective as of _____

We, the undersigned, and each of us, hereby declare, warrant and agree that we are the owners, in the proportions set out below, of all the oil produced from the _____ Farm described as _____ Section _____ Township _____ Range _____ County Parish of _____ State of _____.

We hereby authorize you to run said oil, and, until further notice, to pay for all oil taken from said property, as follows:

STATEMENT OF OWNERSHIP AND ORDER OF DIVISION

Credit To	Division of Interest	Post Office Address

We, and each of us, declare and agree that you are not obligated to purchase all the oil produced from the above described property and that you are hereby authorized, until further notice, to receive from said property for purchase from said parties severally in the proportions named, that part of such oil as you desire

In the numerous cases in which division orders have been involved, the courts have discussed these matters very little, and assuredly have not formulated a clear and precise analysis of an order's contractual nature and the juridical facts occurring subsequent to its execution. However, a factual outline of the legal relationships can be stated briefly. Prior to the execution of the order, but after the lease has been executed, the royalty owners have not sold their royalty oil, but they have designated the lessee as their agent to sell it. Nor do they sell it simply by executing the division order. The latter is an offer, an act

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to purchase or are required to purchase under the laws of this state, subject to the following conditions:

1. The oil purchased under the provisions of this division order shall become your property as soon as the same shall be taken into your custody or delivered on your order to a connecting carrier.

2. The oil received under the provisions of this division order shall be paid for, to the owners set out above, at the price quoted by you and posted in your office at ----------, for the same gravity, kind and quality of oil, on the day of the receipt thereof.

3. In computing the amount of oil received, corrections shall be made for temperature, at the time and place of delivery. Temperature deductions or allowances shall be made on a basis of 60° Fahrenheit temperature in accordance with the abridged Volume Correction Table for Petroleum Oils contained in the Supplement to National Bureau of Standards Circular C-410 issued April 20, 1937. The oil, when delivered to you or your agent, must be free from excessive impurities. Proper deductions shall be made for any impurities. When it is necessary to treat the oil to render it merchantable, such treatment shall be at the expense of the seller.

4. We, and each of us, agree to furnish you satisfactory evidence of title to the property and the oil and, in the event of our failure to do so, to furnish to you an indemnity bond or other security satisfactory to you before requiring payment for said oil, and we further agree that you may retain the purchase price of the oil, without interest, until satisfactory evidence of title, bond or other security is furnished, as above set out.

5. The owners of the working interest warrant and agree that all oil delivered to you hereunder will have been produced in accordance with the applicable provisions of the federal Fair Labor Standards Act of 1938 and any and all amendments thereto and in accordance with all applicable laws, rules, regulations and allowable orders of any governmental authority having jurisdiction over the production of said oil.

6. You are hereby relieved of any responsibility for determining when any of the above interests shall increase, diminish, be extinguished or revert to other parties as a result of the completion or discharge of money or other payments from said interests or as a result of the increase or decrease in production and you are hereby authorized to continue to remit, pursuant to the above division of interest, until you receive notice in writing to the contrary by mail addressed to you at ----------. You shall be held harmless in the event said written notice is not received and are hereby relieved of any responsibility for loss arising out of an overpayment as a result of the failure to receive said written notice.

7. You may discontinue purchasing oil produced from the above described property on giving forty-eight (48) hours' notice to the person, firm or corporation in charge of the operations for producing oil therefrom.

8. This agreement and division order shall become valid and binding on each and every owner above named as soon as signed by him or her, regardless of whether or not any of the other above named owners have so signed.

See also THUSS, TEXAS OIL AND GAS p.511 (2d ed. 1935); 6 THORNTON, OIL AND GAS LAW §§ 3094, 3771 (5th ed. 1932); 7 SUMMERS, OIL AND GAS §§ 1581-1612 (2nd perm. ed. 1939).

whereby the owners of the royalty confer upon the person to whom the order is directed a power to create contractual relations between them.[7] It is an expression of will or intention to sell the oil run under the stated terms, an act which creates in the offeree the power of acceptance.

Further, this offer is to run "until further notice" to offeree by offeror. The time limit is definite in the sense that it is terminable only on a designated condition subsequent. It is indefinite in the sense that it is revocable at the option of offeror. As will be seen subsequently in the discussion on the effect of revocation, this distinction is important.

Hence, after its execution, but before the oil is run, a division order is in the nature of a standing offer which has not been revoked, but which is revocable by offeror. It is not a contract, because there has been no acceptance of the offer or any consideration to support it. Even if a consideration were paid by offeree to offerors, the contract would be revocable, according to its express terms, at the option of the offerors.

Most of the courts consider the execution of a division order alone as simply the making of an offer. In *Hogg v. Magnolia Petroleum Company*[8] the Texas Court stated it somewhat differently when it said that the division order "authorized" the purchasing company to buy the oil until the offer was terminated by either the lessor or his assignees. Another court has said that "when accepted" an order is "a contract of sale," intimating the same to be an offer alone until there was an acceptance.[9] Curiously enough, some courts have said that they consider the order itself an executed, bilateral contract. Yet this attitude is not consistent with basic principles of the law of contracts.[10]

A signed division order would therefore seem to be simply an offer, an act whereby the owners of the oil confer upon the pipe line company the power to create contractual relations between them—that is, to

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[7]Corbin, *Offer and Acceptances, and Some of the Resulting Legal Relations*, 26 YALE L. J. 169, 181 (1917), reprinted in SELECTED READINGS ON THE LAW OF CONTRACTS 170, 179 (1931).

[8]254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered*, 267 S.W. 482 (Tex. 1924); *see* Magnolia Petroleum Co. v. King, 271 S.W. 201 (Tex. Civ. App. 1925).

[9]Amerada Pet. Corp. v. Melton, 139 Okla. 119, 281 Pac. 591 (1929). *See* 24 AM. JUR., Gas and Oil, § 138.

[10]Simpson v. United Gas Pipe Line Co., 196 Miss. 356, 17 So.2d 200 (1944); Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App 1923), *reversed and rendered*, 267 S.W. 482 (Tex. 1924); Amerada Pet. Corp. v. Melton, 139 Okla. 119, 281 Pac. 591 (1929). *See* THUSS, TEXAS OIL AND GAS § 129 (2d ed. 1935): "The division order is a contract between the carrier or purchaser and the parties signing it." It has the "effect of confirming and ratifying the delivery. . ." This misconception is illustrated by the above cases.

create a contract of sale between the parties. However, one must be prepared for a surprise when he reads the confusion in the cases.

After the offer, the next step in the relationships between the parties arises when the product is taken into custody by the purchaser. After the first day's run, what are the results of the transfer between the sellers and the purchaser? There seem to be two possible answers to this question:

(1) A sale of the day's production is consummated; there is an *in personam* obligation for the purchase price; no contract to sell has been created; the division order simply continues as an offer to sell each day's run until revoked; or

(2) The offer has become a bilateral contract to sell, accepted by the purchase of the day's run by the pipe line corporation, and the division order's terms are then valid and binding upon the parties, until revocation by the parties.

The latter alternative would not seem to be sound in the light of the terms of the instrument and the probable intent of the parties. Several courts have indicated an idea that the purchase of a day's oil run by the purchasing company renders an order a bilateral contract to sell *in futuro*. This was held expressly in *Headley v. Hoopengarner,*[11] a West Virginia case, in which the court said that under the terms of the order lessors were bound both as to past and as to future runs of oil. However, this case can be explained on the ground that the terms of the order itself made it an irrevocable contract to sell; the report does not indicate its terms.

The correct principle seems to be laid down by the Texas Court in *Houston Lighting & Power Company v. Liberty Pipe Line Company.*[12]

[11]60 W.Va. 626, 55 S.E. 744 (1906). Accord: Stanolind Oil and Gas Co. v. Terrell, 183 S.W.2d 743 (Tex. Civ. App. 1945); Simpson v. United Gas Pipeline Co., 196 Miss. 356, 17 So.2d 200 (1944).

[12]71 S.W.2d 393 (Tex. Civ. App. 1934); Amerada Pet. Corp. v. Melton, 139 Okla. 119 ,281 Pac. 591 (1929); Smith v. Linden Oil Co., 69 W.Va. 57, 71 S.E. 167 (1911).

The transfer (or transfer and division) order is a division order in which a transferor of a royalty interest gives notice of the transfer and directs payment to a designated transferee. For forms, see 7 SUMMERS, OIL AND GAS §§ 1599-1612 (2d perm. ed. 1939). It is a notice to purchaser, signed usually by both vendor and vendee, that a stated royalty interest has been transfered to a stated transferee, and an agreement that the terms of the division order shall bind vendee, and that production after a certain date shall be credited to vendee. It involves substantially the same problems as an original division order. Amerada Pet. Corp. v. Melton, 139 Okla. 119, 281 Pac. 591 (1929); Phillips Pet. Co. v. Williams, 158 F.2d 723 (C.C.A. 5th 1947); Williams Adm'r. v. Union Bank and Trust Co., 283 Ky. 644, 143 S.W.2d 297 (1940); Shell Pet. Corp. v. Royal Pet. Corp., 111 S.W.2d 1178 (Tex. Civ. App. 1937), *affirmed in part and reversed in part in* 135 Tex. 12, 137 S W.2d 753 (1940).

There the individual, who originally executed a division order, later executed a transfer order of his interest, giving the purchaser notice of the conveyance of his royalty interest and directing payment to a corporation. The latter transferred its interest to another. Later, the original transferor revoked the transfer order because of a failure of consideration. The pipe line company withheld the royalty money until the transferee had given a satisfactory indemnity bond. In holding that the revocation by the original transferor was ineffectual to deprive the transferee and his assignees of the right to payment for oil previously received by the pipe line company, but not paid for, the court said that, under the terms of the order, the oil run pursuant to it became the buyer's property as soon as it was received into the pipe lines. Payment was to be based on the price for daily receipts. Each day the oil run into the pipe line became a completed sale, a "completed transaction." The mere option to the purchaser to pay for oil on or before the tenth day of each succeeding month made each day's run, none the less, a completed sale. All the royalty owners had left after each such delivery for the day, the court said, was a claim for money against the purchaser.

This would appear to effectuate the probable intention of the parties, to complete a contract of sale.[13] Upon delivery, the seller has a right *in personam* against the purchaser. This is the traditional unilateral contract. No promisor receives a promise as consideration for his promise. The exchange for the promise of the purchaser is something other than a promise; it is the transfer of oil to the promisor. No return promise is made by the signer of the division order. The legal duty is unilateral, resting on the promisor-purchaser alone. The correlative legal right of payment is also unilateral; it is owned by the sellers. The offer of title to the oil creates not a duty in the offeror but a power in the offeree. The only operative act to take place is the act of the offeree, the taking possession of the oil and making of the requested promise to pay for it which is automatically a result of such transfer of custody.

The *Restatement of Contracts* defines an offer as a promise, and a unilateral contract as one in which "no promisor receives a promise as consideration."[14] It also points out the possibility that in a sale (such

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[13]Note clause in footnote 6 *supra,* providing that "the oil purchased under the provisions of this division order shall become your property as soon as the same shall be taken into your custody or delivered on your order to a connecting carrier."

[14]1 RESTATEMENT, CONTRACTS §§ 24 (offer is a promise), 12 (unilateral contract) (1932).

as the present one) the offeror makes several promises, such as that a good title shall pass, that he will pay damages resulting from his lack of title, and other covenants set forth in the usual division order.[15] Nevertheless, sales made under an order result in unilateral contracts. The royalty owner, in effect, says in his division order, "I offer to sell you the oil to be produced, in return for your taking it into your possession and your promise to pay me for it at the stated price." At the instant the purchaser takes possession of the oil, the contract is made and at that instant the promise made in the offer is performed by the transfer of ownership of the oil. The buyer's promise is, therefore, the only promise in the contract. Nor does the suggestion that the offeror makes additional promises as to warranty of title, *et cetera,* affect this contract. A unilateral contract is "one in which no promisor receives a promise *as consideration.*" Consideration may designate the agreed exchange for other things than promises, and this would assuredly seem to be true in a sale under a division order. The buyer's promise is not the consideration for the seller's (royalty owner's) promise. The buyer's promise to pay is the consideration or exchange for the oil, or, as Williston would say, for the ownership of the oil. Conversely, the oil is the consideration or exchange for the buyer's promise to pay. The oil, not the seller's offer or promise, is the consideration. Stated differently, the legal effect of the buyer's acceptance is the instant extinction of the royalty owner's rights *in rem* and of other property relations in respect of the oil, and the creation in the purchaser of similar rights and relations. The consideration for the purchaser's promise is this substitution of rights. Sales made under division orders therefore constitute unilateral contracts.[16]

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[15] 1 RESTATEMENT, CONTRACTS § 24, pp. 30-31 (1932).

[16] This analysis is based on the usual operations under a division order and the definite terminology incorporated in the *Restatement of Contracts.* It raises somewhat similar problems to those discussed in a series of articles concerning the *Restatement of Contracts,* written shortly after the preliminary draft was published. Goble, *Is an Offer a Promise,* 22 ILL. L. REV. 567 (1928); Williston, *Is an Offer a Promise,* 22 ILL. L. REV. 788 (1928); *Green, Is an Offer Always a Promise,* 23 ILL. L. REV. 95 (1928); Williston, *An Offer Is a Promise* 23 ILL. L. REV. 100 (1928); Green, *Is an Offer Always a Promise,* 23 ILL. L. REV. 301 (1928); SELECTED READINGS ON THE LAW OF CONTRACTS 203-220 (1931) (being a reprint of the cited articles).

Closely analogous to a sale under a division order is the situation covered by Section 57 of the *Restatement of Contracts.* It provides "If in an offer of a unilateral contract the proposed act or forbearance is that of the offeror, the contract is not complete until the offeree makes the promise requested." This occurs only when the performance of the offer automatically occurs at the moment the promise requested is given. This is substantially what occurs in a sale under an order. The purchaser in the latter instance must take the property into his possession and make the promise to pay.

The Mississippi Court failed to define the contract in *Simpson v. United Gas Pipe Line Company.*[17] The court apparently thought that not only was there a completed sale with delivery of each day's gas run to the purchaser, but also that it was a bilateral contract to sell. It said that "the division order was supported by sufficient consideration." This was the expenditure by purchaser of considerable sums of money to comply with the gas purchase contract, by construction of a pipe line and its extension over the producing area. "It was the intention and purpose that such purchaser should rely and act" on the order. Hence, "the division order is a contract between the carrier or purchaser and the party signing it." The court was actually dealing with a situation where the gas already had been run into the pipe line for purchaser, and the only issue was as to the price for the delivered gas. Yet this dicta, if followed, could produce unfortunate and illogical results.

Another problem which has given some courts difficulty is in determining whether a division order is an assignment of a chose in action or a conveyance of an interest in real property, as contrasted with a sale of personal property. Perhaps the earliest case which makes reference to the doctrine that a division order is a conveyance of an interest in land is *Texas Company v. Pettit.*[18] The Oklahoma Court held that the execution and delivery of an order, designating the interest owned by each party in the production from a lease, was such an assignment of that interest as would be binding on the purchaser and on the parties executing it, and that it operated as the basis of an estoppel upon the parties from recovering a greater amount against the pipe line company than the interest designated in the order. Although not necessary to the decision, the court said that "in our judgment a division order is equivalent to a transfer, assignment, or a conveyance of the interest held by the different parties executing the division order." On the other hand the Texas Court has said that a division order "is not in a strict sense a conveyance of oil even for the terms therein expressed."[19] The Kentucky Court, however, made a more precise analysis when it held that the order did not operate as a conveyance of the unaccrued royalty, but

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[17]196 Miss. 356, 17 So.2d 200 (1944).

[18]107 Okla. 243, 220 Pac. 956 (1923), 231 Pac. 463 (1925); Headley v. Hoopengarner, 60 W.Va. 626, 55 S.E. 744 (1906); Am. Ref. Co. v. Tidal Western Oil Corp., 264 S.W. 335 (Tex. Civ. App. 1924). That accepted division order is in nature of contract of sale of personal rather than real property is further indicated by fact that appointment of agent to execute it does not have to be in writing. Shell Pet. Corp. v. Royal Pet. Corp., 111 S.W.2d 1178 (Tex. Civ. App. 1937), *affirmed in part and reversed in part in* 135 Tex. 12, 137 S.W.2d 753 (1940).

[19]Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 S.W. 482 (Tex. 1924).

that it merely directed the pipe line company as to what disposition may be made of the proceeds of the sale. It thought that "such a division order is separate and distinct from a conveyance of the royalty."[20]

Certainly the typical division order is not a conveyance of an interest in land. The execution of the instrument embodies no element of conveyance—it is an offer to sell. It may be accepted and the sale completed by delivery of the oil to the custody of the buyer. This offer is accepted by the purchaser taking the product into its custody when the oil is run. It is then a unilateral contract. An estimate of a division order in the light of these elementary principles, rather than by the customary unrealistic analogies made in many of the cases, facilitates direct and simple analysis of each case and tends to a more realistic solution.

The courts have not adequately examined the nature of a division order. However, one must conclude that:

(1) A signed division order is only an offer to sell, revocable at the option of offeror;

(2) When each day's oil is run and delivered into the custody of the purchaser, there is a completed contract of sale, unilateral in the sense that there has been created a right *in personam* in the seller against the purchaser for the sale price of the delivered product, but no such right in favor of the purchaser against the seller; and

(3) The division order is not, after a delivery and sale, a contract to sell the oil, but, unless the offer is revoked by either party, a continuing offer to sell when and if it is taken into custody by the purchaser.

Apparently a revocable right to purchase royalty is the only right purchasers desire, else the division order would long since have been changed into a bilateral contract to sell. The purchaser is protected by the facts that generally it is the only available market and that, if there is a rapid decline in the market price, its purchase price drops accordingly. Nor is it bound to purchase any given quantity of oil or gas under the order. The seller can sell his royalty without any storage or transportation difficulties and yet retains the right to revoke his offer when it is to his interest to do so.

The explanation, perhaps, lies in the lease clause which gives lessee the prior right, exercisable at its option, to purchase lessor's royalty oil, paying the posted price prevailing for the field where produced on the

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[20]Williams, Adm'r., v. Union Bank and Trust Co., 283 Ky. 644, 143 S.W.2d 297. 301 (1940).

date of purchase. The lessee accordingly executes a contract with the pipe line company, whereby the latter buys all production from a given tract or area. Because lessee under the usual lease is the agent of the royalty owners to sell their share of the production, lessee's contract of sale with the pipe line company for the royalty owners' oil is an execution of its agency. The division order protects the purchaser primarily as to the proportionate interests of its signers on completed sales.

II. The Popular Fallacy

The courts have been very much concerned with the question of whether the execution of a division order by a royalty owner operates as an estoppel upon him to assert a greater interest as against the purchaser and as against other signers of the order. Most courts have held that the execution of the order and the delivery of the oil to the purchaser operates, with reference to past runs, as the basis of an estoppel upon the royalty owner to assert a greater interest. The estoppel is recognized more clearly by the courts in favor of the purchaser of the oil than it is in favor of the co-signers of the division order. Yet, if the analysis in the preceding section concerning the nature of an order is correct, it is manifest that the much abused doctrine of equitable estoppel or estoppel *in pais* is both unwarranted and unnecessary. The courts have not taken the more logical attitude that the parties are bound by the proportion of interest set forth in the order as to past runs because there has been a completed sale of the delivered production, which, for convenience, might be designated the "sale theory." The conventional approach is by the "estoppel theory."

Practically all of the cases[21] limit both the estoppel and the sale theory to past runs, and refuse to extend it to future runs. If the sale theory[22] is used, this limitation is necessary because of the terms of the division order; if estoppel[23] is the test, it is a necessary principle because that

[21]Headley v. Hoopengarner, 60 W.Va. 626, 55 S.E. 744 (1906); Simpson v. United Gas Pipe Line Co., 196 Miss. 356, 17 So.2d 200 (1944).

[22]Phillips Petroleum Co. v. Williams, 158 F.2d 723 (C.C.A. 5th 1947); Magnolia Pet. Co. v. King, 271 S.W. 201 (Tex. Civ. App. 1925); Houston Lighting and Power Co. v. Liberty Pipe Line Co., 71 S.W.(2d) 393 (Tex. Civ. App. 1934); Childers v. Neely, 47 W.Va. 70, 34 S.E. 828 (1899); Amerada Pet. Corp. v. Melton, 139 Okla. 119, 281 Pac. 591 (1929). *See also* Farrell v. Simms, 209 La. 1072, 26 So.2d 143 (1946).

[23]Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 S.W. 482 (Tex. 1924); Gypsey Oil Co. v. Marsh, 121 Okla. 135, 248 Pac. 329 (1926); Shreveport-El Dorado Pipe Line Co., Inc. v. Bennett, 172 Ark. 804, 290 S.W. 929 (1927); Shell Pet. Corp. v. Royal Pet. Corp., 111 S.W.(2d) 1178 (Tex. Civ. App. 1937), *reversed in part and affirmed in part in* 135 Tex. 12, 137 S.W.(2d) 753 (1940); Robbins v. Martin, 18 La. App. 223, 138 So. 132 (1931); Texas Co .v. Pettit, 107 Okla. 243 220 Pac. 956 (1923), 231 Pac. 463 (1925); Headley v. Hoopengarner, 60 W.Va. 626, 55 S.E. 744 (1906).

doctrine is based upon past detrimental action in justifiable reliance upon misrepresentation.

The cases show why the use by the courts of the doctrine of estoppel *in pais* is superfluous and artificial, and at times unwise. The necessary results can be reached much more simply with sound principles within the boundaries of the law of sales. A leading case, *Headley v. Hoopengarner*,[24] which was decided in 1906 by the West Virginia Court, involves both doctrines. Royalty owners had signed a division order fixing and defining their fractional interests in the oil to be produced. Headley agreed to accept 1/5 of 1/15 of the gross production, but later discovered that he was entitled to a larger fractional interest. He asked for an accounting in excess of the amount stated in the division order. The court held that, as to the parties to the division order and the purchaser, Headley was estopped to claim more than the amount recited in it. The terms of the order, it would seem, bound lessor as to past and future runs of oil. It was considered in the nature of a contract "fixing and representing the true interest of the parties thereto. . . . A contract based upon one's having a certain title to property will estop the parties. . . . from claiming a greater title." The opinion does not give the terms of the instrument and does not indicate whether there was a clause providing for notice to the purchaser which would terminate the agreement. The court apparently held that, where no such clause for notice and revocation exists, the royalty owner is not only estopped by his stipulation as to past runs, but is bound to the agreed interest for the duration of the contract.

Plaintiff argued that the purchaser could examine the title and ascertain if Headley owned a larger interest than the one he represented, but the court answered by saying that the purchaser was

> not called upon nor required to go further than the contract made by all the parties in the division of the oil. Equity did not require them to search the records or even look to the lease to see what interest Headley had and the contract itself expressly represented and told them what that interest was . . . by his contract he must now stand.[25]

In the absence of fraud, a purchaser is entitled to rely upon the representations in the division order.

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[24]60 W.Va. 626, 55 S.E. 74 (1906).
[25]60 W.Va. 626, 55 S.E. 744, 749 (1906).

In *Texas Company v. Pettit*,[26] the Oklahoma Court applied both the estoppel theory and the doctrine that the order was equivalent to a transfer or conveyance. The execution and delivery of an order designating the interest owned by each participant in the production was held to operate as an estoppel *in pais* or estoppel in fact, as to the parties executing it, from recovering a greater amount against the purchaser than the designated interest. This principle has been extended to persons who did not sign the order where payments were made to and assented to by them on the basis provided in the order.[27]

However, the estoppel theory is not applied to production obtained after proper notice is given that the seller is claiming a larger interest.[28] And where an order is limited to part of a tract of land, the courts have refused to apply estoppel as to production from the balance of the tract not covered by it.[29] Yet one may be estopped by the act of his appointed agent in signing a division order. In one case[30] a royalty owner designated a creditor as his agent to receive royalty payments in order to liquidate a debt, and the creditor signed the order and sent the royalty owner notice each month that a stated payment had been received and credited on his obligation. The royalty owner was estopped to deny the validity, terms and conditions of the order.

The usual division order authorizes the purchasing company to take the oil until the offer shall be terminated by either the owner or his assignees. Where the owner gives notice that he is claiming a greater interest than that designated in the division order, the purchaser accepts future runs of oil with any liabilities which might result from such action. The purchaser is liable for conversion under such circumstances.[31] For example, in one case[32] a lessor conveyed 1/3 of his royalty interest and

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[26]107 Okla. 243, 220 Pac. 956 (1923), 231 Pac. 463 (1925). *But see* 3 SUMMERS, OIL AND GAS § 590, p. 424 (2d perm. ed. 1939).

[27]Phillips Pet. Co. v. Williams, 158 F.2d 723 (C.C.A. 5th 1947); see Union Producing Co. v. Pardue, 117 F.2d 225, 227 (C.C.A. 5th 1941).

[28]Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 S.W. 482 (Tex. 1924). *See* 3 SUMMERS, OIL AND GAS § 590. p. 425 (2d perm. ed. 1939).

[29]Shreveport-El Dorado Pipe Line Co., Inc. v. Bennett, 172 Ark. 804, 290 S.W. 929 (1927).

[30]Shell Pet. Corp. v. Royal Pet. Corp., 111 S.W.2d 1178 (Tex. Civ. App. 1937), *reversed in part and affirmed in part in* 135 Tex. 12, 137 S.W.2d 753 (1940).

[31]Magnolia Pet. Co. v. King, 271 S.W. 201 (Tex. Civ. App. 1925); Elliott, Jones and Co. v. Waurika Oil Ass'n., 253 S.W. 601 (Tex. Civ. App. 1923); Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 S.W. 482 (Tex. 1924).

[32]Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 S.W. 482 (Tex. 1924). Accord: Shell Pet. Corp. v. Royal Pet. Corp., 111 S.W.2d 1178 (Tex. Civ. App. 1937), *reversed in part and affirmed in part in* 135 Tex. 12, 137 S.W.2d 753 (1940).

retained a vendor's lien. Upon default in payment by the vendee, lessor gave the purchaser notice of his claim, and it was held that he was not estopped from asserting his lien as against the pipe line company purchasing the oil, and was not estopped from recovering from the latter the value of the royalty which had accrued after he had given proper notice. However, he was estopped "as to all oil purchased and paid for by the company prior to notice that he was relying on his lien."

Conceivably, the estoppel theory might be applied to representations in the division order as to facts other than the size of the interest owned by the royalty owner. There do not appear to be any cases in which this has been done. Nevertheless, the doctrine of equitable estoppel has been denied application where it was contended that lessor, in signing a division order before production had begun, was estopped to deny that production was in paying quantities sufficient to continue the lease after its primary term.[33] The court correctly pointed out that the order contained no recital that the well was producing in paying quantities (an impossibility since production had not then begun), and that knowledge of the facts by the person against whom the estoppel is claimed is a prerequisite to its application. If the lessor had known the facts and had agreed in the order that the production obtained was in paying quantities, and if at that time there had been production, he would have been estopped to deny the validity of the lease.

Equitable estoppel is not a theory well adapted to the facts in this type of instrument. Where a completed delivery is made, there is a completed sale. A unilateral contract is a promise on only one side, that of the purchaser. Simple contract principles render the sale completed, effective and binding upon the parties upon delivery. Estoppel would seem to be a circuitous linchpin for a rationale of any sort.

A leading case applying the "sale theory" is *Childers v. Neely*.[34] There the West Virginia Court held that the execution of a division order by members of a partnership, setting apart to each member of the firm a certain share of the oil sold, prevented a partner from claiming a lien on the share of another partner as partnership property. The division order executed by the partners was a contract between them to divide the oil run, and to make it separate and individual rather than partnership property. A logical extension of this "sale theory" is that where repug-

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[33]Gypsey Oil Co. v. Marsh, 121 Okla. 135, 248 Pac. 329 (1926).

[34]47 W.Va. 70, 34 S.E. 828 (1899). Accord: Bartlett and Stancliff v. Boyles, 66 W.Va. 327, 66 S.E. 474 (1909). Summers believes the *Childers* case held the division order to be a transfer of the oil. 3 SUMMERS, OIL AND GAS § 590, pp. 423-424 (2d perm. ed. 1939).

nancy exists between the lease and the division order, the latter supersedes the former in determining the price and the extent of liability of the purchaser.[35]

The "sale" doctrine is extended to delivered production for each day. Hence even though the pipe line company is given the right to make payment for production "on or before the 10th day of the succeeding month," each day's oil run is a completed sale, or "transaction," and the mere option to purchaser to pay on or before the 10th day of the succeeding month does not alter the nature of the completed sale for each day's production.[36]

Whatever theory is applied, the division order is binding upon seller and purchaser as to past runs. An additional question can then be posed which is supplementary to this proposition. Is a division order when acted upon a contract between the royalty owners executing it? Where the same instrument is signed by several tenants in common who are also partners, it has been held that they are contracting between themselves.[37] In *Headley v. Hoopengarner,*[38] the royalty owner was not only estopped as to the purchaser by his stipulation, but also as to other royalty owners (not partners) who had signed the order, including subsequent transferees.

The Louisiana Supreme Court has held that a division order is binding as a mutual contract between the parties executing it. In *Robbins v. Martin,*[39] the plaintiff sued to cancel a certain mineral deed because of alleged fraud, misrepresentation and failure of consideration. Plaintiff along with others had executed an order in which he acknowledged that he was the owner of a certain fractional royalty interest, which was left him after the execution of several mineral deeds. The court quoted the division order at length, and held that the signers of it had agreed that they were the owners in the proportions set out in it, and that, as to them, plaintiff was bound to the interest which he represented he had. The court said:

> The courts of last resort in this state have not passed on the specific question here presented, but the courts of other and older oil-producing states have considered and disposed of the

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[35]Amerada Pet. Corp. v. Melton, 139 Okla. 119, 281 Pac. 591 (1929).

[36]Houston Lighting and Power Co. v. Liberty Pipe Line Co., 71 S.W.2d 393 (Tex. Civ. App. 1934); *see also* Magnolia Pet Co., *et al* v. King, 271 S.W. 201 (Tex. Civ. App. 1925); Elliott, Jones and Co. v. Waurika Oil Ass'n., 253 S.W. 601 (Tex. Civ. App. 1923).

[37]Childers v. Neely, 47 W.Va. 70, 34 S.E. 828 (1899).

[38]60 W.Va. 626, 55 S.E. 744 (1906).

[39]18 La. App. 223, 138 So. 132 (1931).

proposition. In Headley v. Hoopengarner et al, supra, it was held that one who signs a 'division order' fixing and defining his interest in the oil produced and directing the delivery by the pipe line company to him of payment of that interest, as his portion, will be estopped to claim more than that interest against parties to the 'division order' and their assignees.

The courts of last resort of the states of Montana and Oklahoma have held to the same effect; that is, that the signers of a 'division order' with respect to each other are estopped by its provisions.[40]

W. L. Summers believes that when the signers are strangers and only co-tenants of the oil, there is no basis for saying that they are contracting with each other.[41] Ordinarily, there is no one division order for a particular well or tract of land. Many orders are executed individually, each royalty owner signing a distinct and separate instrument. Where this is done, there is perhaps less basis for saying that the signers of the respective division orders are contracting with one another, with the resulting mutual obligations and rights. However, the several fractional royalty interests aggregate an entirety, and payments are made on the basis of the entire royalty interest. Co-signers of a division order represent to one another, in effect, that they own stated interests, and, if the proof can show the necessary reliance on this assertion by a purchaser from a co-tenant, equitable estoppel should apply to preclude that co-signer from denying that he owns only the stated interest. The principles of estoppel by deed would seem to be pertinent. Where there is no conveyance of the royalty and no element of estoppel, it is probable that in most cases there is no intention to contract mutually, and this seems to be the accepted rule.[42]

Generally, the lessee either joins in the execution of a division order with all of the royalty owners, or executes a separate order stipulating its interest in the gross production. The usual form of lease gives lessee a prior right and option to purchase royalty oil at the market price. Accordingly, the lessee also enters into a separate contract with the purchasing corporation, whereby the former agrees to sell the entire output of a well for a stipulated price. The royalty owners have only one contract with the purchasing company; the lessee has two: its contract of

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[40]Robbins v. Marin, 18 La. App. 223, 138 So. 132, 136 (1931).

[41]3 SUMMERS, OIL AND GAS § 590, page 423, note 39 (2d perm. ed. 1939). *Accord:* THUSS, TEXAS OIL AND GAS § 129 (2d ed. 1935).

[42]See *supra* note 41.

sale and the division order.[43] If the lessee joins in executing an order with royalty owners, it might be argued that it is contracting jointly with them, yet this would be superfluous inasmuch as the lease defines the rights of the parties. Further, it is said that where a lessee joins in a division order with royalty owners, it cannot maintain a suit against the purchaser for conversion of the oil, because that right of action is in the royalty owners alone.[44]

The simplest and most logical approach has not been followed by the courts. Effectiveness is not dependent upon estoppel. The latter is necessary only where there are missing the elements of mutuality of assent, bilaterally or unilaterally, and an accepted division order is a unilateral contract. Moreover, estoppel requires detrimental action in justifiable reliance on an intentionally erroneous statement, and a person's mere supposition that he has made a contract would hardly amount to such detrimental action. It is true that this factor might often arise where the purchaser asserts it has relied upon a division order; expenditure of a large sum of money by a pipe line company in order to comply with an oil or gas purchase contract would be such detrimental action. However, the typical order is revocable at the option of either the buyer or seller, and such action today under such circumstances would not constitute justifiable reliance. The contract, if it could be called such, would apply only as to past transactions and would not prevent the seller or buyer from revoking the order as to future production.

For these reasons, the cases dealing with division orders and the basis of the obligations under them generally do not fall within the doctrine of equitable estoppel as that subject has heretofore been developed. And promissory estoppel is designed only for the unusual situation in order to prevent injustice.[45] Certainly a more suitable nomenclature is needed.

III. Some Additional Comments Upon How the Courts Have Interpreted and Applied Division Orders

Ordinarily a lessee, with the right under its lease to purchase the royalty, contracts with a pipe line company to sell to the latter the entire output of the well. This is a separate contract to sell at an agreed

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[43] 7 Summers, Oil and Gas §§ 1561-1567 (2d perm. ed. 1939) (forms of purchase agreements with pipe line company).

[44] Amerada Pet. Corp. v. Melton, 139 Okla. 119, 281 Pac. 591 (1929).

[45] 1 Restatement, Contracts § 90 (1932).

price.[46] The purchaser requires the lessee to obtain a division order from the royalty owners, and an order is signed also by lessee on all of its interest. A controversy oftentimes arises where there is a conflict between the terms of the sale contract and of the division order. This was discussed in *American Refining Company v. Tidal Western Oil Corporation,*[47] in which plaintiff sought to enjoin the appropriation of casinghead gas from a well to which it had purchased all of the production from the lessee-defendant, under such gas sale contract. This contract, which was executed in consideration of services to be performed by the buyer, was a conveyance of an estate in the land, and an injunction was issued against lessee. The purchaser had title to the gas when it was produced. However, the division order was not intended to change or in any way affect the terms of the original gas sale contract, the court said, and could not be given that construction without doing violence to the intention of the parties. The order "relates only to a division of proceeds of the sale of the gas until further notice." It does not supersede the terms of the conveyance made in the sale contract and "does not affect the question of title to the gas itself."

Preliminary negotiations and correspondence with reference to obtaining the order may become part of it unless they are carefully excluded. In *Elliott Jones & Company, Inc. v. Waurika Oil Association,*[48] the operator of an oil pipe line wrote a letter to a royalty owner in which he offered to pay $1.75 a barrel for the oil to be run. This offer was accepted by letter. The royalty owner executed a printed form of division order which was sent to him by the operator, and it stated that the "posted price paid by" purchaser would be the cost. In a controversy over what was the agreed price, the court held that the letter written by the purchaser, the operator's reply, and the division order should be construed together as forming one contract. The order became a part of the contract, but it did not supersede the agreement stated in the letter as to the price of the oil. The letters modified the terms of the division order insofar as the price of the oil was concerned.

Moreover, the fractional proportions outlined in the instrument may be changed by the property description in it. In *Magnolia Petroleum Company v. King,*[49] the order stated that purchaser would pay the royalty

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[46]See gas sale contract quoted and discussed in Am. Ref. Co., et al v. Tidal Western Oil Corp. 264 S.W. 335, 336 337 (Tex. Civ. App. 1924); 7 SUMMERS, OIL AND GAS §§ 1561-1567 (2d perm. ed. 1939).

[47]264 S.W. 335 (Tex. Civ. App. 1924).

[48]253 S.W. 601 (Tex. Civ. App. 1923).

[49]271 S.W. 201 (Tex. Civ. App. 1925).

owner his assigned portion of the royalty "of Lot 2, containing fifteen acres." The lease included this same description. The purchaser paid the designated fraction of production on the basis of fifteen acres. However, subsequent litigation determined that a .56 acre disputed strip was included within Lot 2, making the area of this lot 15.56 acres instead of fifteen acres. The property description ("Lot 2") in the division order was held to overrule and to govern the specific statement of the fractional interest by acre ("containing 15 acres"), and it was held that distribution must be made on the basis of 15.56 acres. The court seems to have reached an equitable result without the necessity of reformation. It simply carried out the apparent intent of the parties.

There was a patent conflict between the terms of the lease and the division order in *Stanolind Oil and Gas Company v. Terrell.*[50] Plaintiff had leased her lands to Stanolind Oil Company, the lease providing as follows:

> In addition to the royalties hereinabove stipulated, there shall be paid to the lessors from the proceeds of the sale of one-eighth of the total oil, when and if produced, saved and sold, the net sum of $64,000.00 without deduction of any kind or character.

After production defendant charged plaintiff with the Texas gross production or severance tax on her royalty. Plaintiff argued that under the above-quoted clause defendant was to pay her the total sum without any kind of deduction, but defendant claimed that the terms of the lease were modified by the division order signed by plaintiff. Among its provisions was one that settlements were to be made monthly for all purchases during the preceding month "less any taxes required by law to be deducted and paid by you as purchaser." The court thought that "a division order is ordinarily a contract under which the production is purchased or accepted for transportation by the pipe line company." It has for its dominant purpose the sale of production, there being nothing "contractual in these recitations. They merely reflect the interest of the parties as created by the lease." In other words, "the division order . . . relates only to the sale of the production which the lessors own in virtue of the terms of the lease." There was no intention for it to affect lessee's obligations.

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[50]183 S.W.2d 743 (Tex. Civ. App. 1945). *Accord:* Phillips Pet. Co. v. Williams, 158 F.2d 723 (C.C.A. 5th 1947). In *Simpson v. United Gas Pipe Line Co.*, 196 Miss. 356, 17 So.2d 200 (1944), the terms of the division order superseded the lease provisions as to price of the gas. As to duty to pay to "last record owner" under La. statute, *see* State *ex. rel.* Bean v. Caddo Crude Oil Purchasing Corp., 189 So. 333 (La. 1939); State *ex. rel.* Brown v. United Gas Public Service Co., 197 La. 616, 2 So.2d 41 (1941).

The phrase "without deduction of any kind or character" in the lease constituted an agreement by lessee that no deduction for such tax should be made. The court's idea that a division order can not modify or amend a lease is a curious conclusion, certainly not based upon precedent or upon reading of an order. However, the case is supportable for the reason that the specific clause in the lease excluding collection of taxes represented the contractual intent of the parties.

In distributing royalty money under a division order, particular care should be exercised to protect the purchaser from existing liens, which might extend to both the oil itself (although this is disputable where the lien is granted subsequent to the lease) and to the proceeds of the sale. The application of a lien is dependent upon notice, actual or constructive. Most of the cases have been concerned with the effective date of an express notice of lien to the purchaser. Such a notice is in the nature of a condition subsequent.[51]

In *Hogg v. Magnolia Petroleum Corporation,*[52] a lessor conveyed one-fourth of his royalty interest, retained a vendor's lien, and then joined with the purchaser of that interest in executing a division order, which authorized the purchasing company to accept royalty on the stated basis until further notice. The lessor later gave proper notice to purchaser of his election to exercise his vendor's lien upon this one-fourth royalty. He was permitted to assert his lien in this manner, but the court held that he was estopped to deny a waiver of his vendor's lien as to all purchases paid for by the company prior to the notice.

The effect of such notice, however, is limited to production after the effective date of the notice, whether it be immediately upon its receipt, or thirty days after the notice is given, as is often provided in division orders. It has been argued unsuccessfully that, where an order provides for payment on or before the tenth day of the succeeding month, the notice operates to impose upon the purchaser an obligation to pay the owner, exercising his vendor's lien, all funds due and owing his transferee at that time, including the royalty money for production then owing but produced before the notice went into effect.[53] But the oil run into the pipe lines each day was conceived to be a completed sale. The mere option of purchaser to pay on or before the tenth day of the

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[51]Kinne v. Duncan, 383 Ill. 110, 48 N.E.2d 375 (1943). *See,* Phillips Pet. Co. v. Williams, 158 F.2d 723 (C.CA.. 5th 1947).

[52]254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 S.W. 482 (Tex. 1924).

[53]Houston Lighting and Power Co. v. Liberty Pipe Line Co., 71 S.W.2d 393 (Tex. Civ. App. 1934).

succeeding month made it none the less a completed transaction each day. After such delivery each day, the owner had a mere claim for money against the purchaser. The notice does not reach back and take from the transferee what previously had been his. Of course the funds in the hands of the purchasing corporation could have been garnisheed.

The notice of a pending suit and claim may arise by constructive as well as actual notice. In a Kentucky case[54] the royalty owner executed a recorded mortgage on his interest and later, during the pendency of a suit to foreclose the mortgage, executed a division and transfer order directing the royalty to be paid to a third person. In a suit for accounting by the mortgagee against the transferee of the royalty, the court said that the execution of the order was not effective to transfer the title to the royalty as against the mortgagee whose lien attached to the unaccrued royalty interest. It was not a conveyance, but it merely directed the purchaser as to what disposition should be made of the proceeds.

On the other hand, if the royalty owner executes an order directing the purchaser to pay the proceeds to a named creditor under an assignment, until a designated amount of his debt is liquidated, and the creditor signs an order agreeing as to the fractional interest, and the debtor receives regular notice of the monthly payments made to the creditor by the purchaser, the debtor is estopped to deny the validity of the division order as to past payments.[55] This is a somewhat attenuated application of the estoppel doctrine, but the equity of the result is satisfactory. However, the purchaser should have required a written contract of agency executed by the royalty owner-debtor authorizing his creditor to sign a division order.

Similar principles of estoppel and notice apply to mining partners. They have a lien on the social property for advances before they have divided the production of the business by a division order, but no such lien exists on the property after an order is executed.[56] A division order is a contract between the partners to divide the community property.

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[54]Williams Adm'r. v. Union Bank and Trust Co., 283 Ky. 644, 143 S.W.2d 297 (1940).

[55]Shell Pet. Corp. v. Royal Pet. Corp., 111 S.W.2d 1178 (Tex. Civ. App. 1937), *reversed in part and affirmed in part in* 135 Tex. 12, 137 S.W.2d 753 (1940).

[56]Greenlee v. Steelsmith, 64 W.Va. 353, 62 S.E. 459 (1908); Childers v. Neely, 47 W.Va. 70, 34 S.E. 828 (1899); Bartlett and Stancliff v. Boyles, 66 W.Va. 327, 66 S.E. 474 (1909); Harris v. Young, 298 Ill. App. 319, 131 N.E. 673 (1921); Kinne v. Duncan, 383 Ill. 110, 48 N.E.2d 375 (1943). *Cf.* Enterprise Oil and Gas Co. v. National Transit Co., 172 Pa. 421, 33 Atl. 687 (1896).

But, of course, notice of revocation may be given to the purchaser and the order terminated.

Where insolvency or bankruptcy by the purchaser intervenes after the oil has been delivered, and it cannot be traced as a fungible good, what rights, other than those of general creditors in bankruptcy, have the royalty owners? In *Amerada Petroleum Corporation v. Melton*[57] the following facts were involved: *A* executed an oil, gas and mineral lease, which was assigned by the original lessee to *B*. *B* entered upon the premises and produced oil. *A* and *B*, lessor and lessee, executed a division order to *C*, in which their respective interests were set forth. It also provided that *C* should pay lessor directly for his proportionate share of the production. After delivery, *C* became bankrupt without having paid *A*, the royalty owner. *A* brought suit against his lessee *B* for his proportionate share of royalty money for the oil delivered to *C* under the contract of sale and the division order. In denying recovery against the lessee, the court held that under the order payments were to be made directly to *A*. Lessee had signed a contract to sell the entire output of the well to *C*, but, although the royalty owner had signed a division order, he had not joined in this sale contract. The court said:

> The execution of the division order was not a novation; it was a contract that superseded the assignment [the right in lessee to extract and sell the oil]. It was a direction to the defendant [lessee] by plaintiff [lessor] as to how, when and where his one-eighth oil should be delivered. When accepted by the Shoate Oil Corporation [purchaser], it was a contract of sale complete within itself.[58]

B could not have maintained an action against *C*, because the lessor's contract with the purchaser (the division order) gave lessor the sole right of action against *C* for his interest. "No one but plaintiff could have maintained that action." However, it was pointed out that "had plaintiff not executed the division order and the defendant had sold the oil, plaintiff would have had a right against defendant for his proportionate share and defendant could have been made to respond." In other words, the execution of the division order by *A*, when accepted, constituted a sale by him of his one-eighth royalty directly to the purchaser.

A argued that no consideration for the division order passed between him and lessee, but the court observed that *A* had accepted delivery from

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[57]139 Okla. 119, 281 Pac. 591 (1929).
[58]139 Okla. 119, 281 Pac. 591, 593 (1929).

B of the oil by executing the division order, and by that action had sold it to the pipe line company when produced. It was not delivered to lessor by lessee, but it was delivered to lessor's vendee in accordance with a written direction binding on all parties. *A* was denied recovery for production which had been delivered "by his assignee as per his direction."

This result seems to be sound. The division order supersedes the lease in that it operates as a novation as to the royalty. The duties of a lessee after its execution are those of an agent of the royalty owners: to deliver the royalty oil to the purchaser as directed. By executing the order, lessee gives up any right or claim to the royalty. When that duty to deliver is consummated, lessee has performed its obligation. After that, lessor's rights, if any, are against the purchaser. On the other hand, if the royalty owners do not execute an order and the purchaser does not pay for it because of intervening bankruptcy or otherwise, lessor can sue lessee, it would seem, either for damages for breach of its agency contract or for conversion.[59] Although there are no cases recognizing the agency theory, it would seem to follow on well-established principles.[60]

Under the doctrine of the *Melton* case, the signing of a division order deprives a royalty owner of certain rights against his lessee. Conversely, a royalty owner who did not sign the division order conceivably might obtain rights under it where he has authorized a lessee to obtain production and a purchaser accepts delivery of the production including that of the party who did not sign the order. Because plaintiff would be asserting rights under a contract made by other parties, this might be considered to be an extension of the third party beneficiary doctrine. At least one court has indicated in a dictum its approval of this type of suit.[61] There would seem to be no objection in principle. It is a

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[59]Magnolia Pet. Co. v. King, 271 S.W. 201 (Tex. Civ. App. 1925); Elliott, Jones and Co. v. Waurika Oil Ass'n., 253 S.W. 601 (Tex. Civ. App. 1923); Hogg v. Magnolia Pet. Co., 254 S.W. 580 (Tex. Civ. App. 1923), *reversed and rendered in* 267 SW. 482 (Tex. 1924). In *Corrigan v. Shell Pet. Corp.*, 62 S.W.2d 663 (Tex. Civ. App. 1933), court refused punitive damages for wilful conversion, where oil was run before royalty owner signed order. *Cf.* Enterprise Oil and Gas Co. v. National Transit Co., 172 Pa. 421, 33 Atl. 687 (1896).

[60]Restatement, Agency §§ 400-402 (1933); 2 Am. Jur., Agency §§ 423-424 (1936).

[61]McLean v. Texas Co., 103 F.2d 989 (C.C.A. 5th 1939), *cert. denied* in 308 U.S. 579 (1939). *See also* Phillips Pet. Co. v. Williams, 158 F.2d 723 (C.C.A. 5th 1947), in which on page 727 the court said: "As to persons who did not sign division or transfer orders, payments made to and accepted by, or settlements made with them, on the basis provided for in these orders, will be equally binding. If, however, the evidence shows not that the payments were received upon the basis provided in these agreements, but that they were received merely as pay-

fruitful field which may be fully explored in the future. Many operators find it necessary to produce and many pipe line companies find it necessary to buy production from a well where one or more small royalty owners have not signed division orders. The purchaser is protected against conversion by the usual operator's warranty of title, but it would not be protected by such warranty against a suit brought by those royalty owners who did not sign division orders, when they later seek to enforce rights under certain provisions of the existing orders as third parties beneficiary.

However, rights acquired under orders necessitate correlative duties. Estoppel *in pais* has been applied properly in order to preclude attack upon mineral conveyances on the ground of fraud, misrepresentation or mutual mistake. For example, in *Brown v. Sugar Creek Syndicate,*[62] plaintiff sought to cancel a pooling or unitization agreement and a division order because, allegedly, plaintiff, an illiterate negro, signed these contracts as a result of error, misunderstanding, and fraud in the procurement. However, plaintiff had accepted royalty payments without protest for five years, under the terms of a division order. These facts operated to estop him from denying the validity of the unitization agreement. Similarly, acceptance by a co-owner of royalty under a division order may constitute ratification of the operating agreement under which production was obtained,[63] and execution of a division order by an owner of part of the minerals, who did not sign the lease, constitutes ratification by him of the lease.[64]

A typical provision permits the deduction before payment of royalty of a certain fraction of it as wasted because of dirt and other extraneous substances. If the clause is sufficiently definite, it is enforceable. A facetious application of such a provision is found in *United States v. Stanolind Crude Oil Purchasing Company.*[65] Oil and gas leases had been executed by the Osage Indian Tribe under a federal statute authorizing them under regulations prescribed by the Secretary of the Interior, one of which provided that no oil should be run into any pipe line "until a division order is executed and approved by the Superin-

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ments tendered by the company and accepted by the recipients on the faith and in the belief that they were being paid the amount due them, the mere acceptance of these payments would not constitute an accord and satisfaction or a binding settlement."

[62]195 La. 865, 197 So. 583 (1940).

[63]Connette v. Wright, 154 La. 1081, 98 So. 674 (1924). *Accord:* Cary v. Sunburst Oil and Gas Co,. 72 Mont. 383, 233 Pac. 909 (1925).

[64]Texas & Pacific Coal & Oil Co. v. Kirtley, 228 S.W. 619 (Tex. Civ. App. 1926).

[65]113 F.2d 194 (C.C.A. 10th 1940).

tendent." Such an order was approved and it provided that the defendant purchaser could deduct 3% of all oil received from wells into the pipe lines on account of dirt and sediment. The United States sought to recover for 3% of the production on the ground that the oil had no dirt and sediment in it and that all of it was merchantable, but the court said that such a provision was a trade custom in general usage and in recognition of commonly known facts, and that the Secretary of the Interior, in providing regulations for division orders and in failing to prohibit such a clause, impliedly approved the use of it. The court said that "we may take judicial notice of the fact that no crude oil is wholly free from impurities"!

Another usual clause provides protection for the purchaser in paying out royalty money: the royalty owner agrees to furnish either satisfactory proof of title, or indemnity bond, or other security as to his true ownership. This covenant furnishes a necessary protection. However, the provision that the purchase price of the oil may be retained by purchaser "without interest" is subject to reasonable limitations. For example, in *Gulf Pipe Line Company v. Warren*[66] purchaser filed an interpleader suit in 1926 which was not actually tried until 1930. The court found that plaintiff was not occupying the position of a disinterested stakeholder and that it had engaged in delaying tactics. Hence the purchaser was held liable for interest on the royalty money retained by it until it demanded and the royalty owner refused to furnish an indemnity bond. Nevertheless, the right of the royalty owner to give an indemnity bond and to receive payment for his claimed portion of the royalty is eliminated where the aleatory element of the contract disappears.[67]

IV. Conclusions

Several years ago an able scholar said that

> the unilateral contract has proven a stumbling block to nearly every court which has had to consider the question. In no domain of the law are the opinions marked by such lack of clear thinking.[68]

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[66]45 S.W.2d 719 (Tex. Civ. App. 1931). The following case recognizes the validity of the clause requiring an indemnity bond: Houston Lighting and Power Co. v. Liberty Pipe Line Co., 71 S.W.2d 393 (Tex .Civ. App. 1934).

[67]McLean v. Texas Co., 103 F.2d 989 (C.C.A. 5th 1939), *cert. denied* 308 U.S. 579 (1939). After plaintiffs' suit was filed but before court's opinion, the Texas court had decided the question of title adverse to plaintiffs. Hence federal court held plaintiffs could not furnish satisfactory indemnity against the happening of a known fact.

[68]Wormser, *The True Conception of Unilateral Contracts,* 26 Yale L. J. 136 (1916).

This statement is applicable particularly to the experiences of the courts with division orders. Most of the cases are characterized by a curiously adumbrated type of analysis. Some courts have considered an accepted order to be a bilateral contract. Others have found it necessary to find a conventionalized consideration to support it, such as detrimental action by the purchaser in reliance on the order. Others have called it an assignment of a chose in action or a conveyance of an interest in land. Yet a few tribunals have analyzed a division order more concisely: it is simply a revocable offer to sell. Each day's run of production constitutes a completed sale. It is a unilateral contract. The transfer of ownership of the oil is the consideration or exchange for the purchaser's promise to pay. Realistic estimates of the facts occurring in such a sale are facilitated by analysis on the suggested basis.

In considering the reason for the effectiveness of a division order as to past runs, the courts have shown an unusual lack of clear thinking. It is too frequently the habit to drag in equitable estoppel with no clear idea of the meaning of the term, but with the confidence that it sounds well. It is used to prevent the royalty owners from disavowing their offers to sell at the stated terms, and is limited to past runs. Yet this is a begging of the question because, since the offer to sell, which is made in the order, has been accepted by delivery, there is a unilateral contract as to that sale. One may hope that the courts will soon decide that the doctrine of equitable estoppel is a superfluous and artificial reasoning device with which to interpret division orders. It is not in accord with sound principle or precedent.

The courts have a record which is much better in the accuracy of the results of their decisions than in their logic, and, in this respect, most of the cases appear to be sound. They have considered many of the more important issues and clauses of division orders. These are discussed in the preceding pages. They constitute an essential foundation for further development of the law with reference to this type of contract of sale. More importantly, they interpret the fundamental marketing contract for the gas and petroleum industries. Curiously yet unfortunately, the courts in interpreting division orders have reached in most cases logical results with wholly illogical processes.

THE LEGAL CONSEQUENCES OF THE INTERSTATE NATURAL GAS COMPANY DECISION AND RELATED CASES†

*Donald C. McCreery**

The sole issue presented in the case of *Interstate Natural Gas Company v. Federal Power Commission*,[1] as stated by the Chief Justice in announcing the unanimous decision of the Supreme Court on June 16, 1947, "involves the jurisdiction of the Federal Power Commission to *regulate* sales made in the field by [Interstate] to three pipe-line companies, each of which transports the gas so purchased to markets in States other than Louisiana."

It is the fact established by the record in that case and not questioned, or apparently considered, by the Supreme Court, that both the transportation of such gas from the Monroe Field, Louisiana, to states other than Louisiana and the subsequent sales of such gas in states other than Louisiana, admittedly for resale for ultimate public consumption, were activities of the three pipe-line companies, in which activities Interstate Company had no participation whatever.

The case was a "rate case" under Section 5(a) of the Natural Gas Act.[2] The Commission action under review was, again in the language of the Chief Justice, "an order requiring petitioner to effect substantial rate reductions . . . for the sales in issue in this case."

Thus the regulatory authority exercised by the Commission was imposed directly upon Interstate Company, its operations, its business, its property, including its gas reserves and estates, and its revenues. This fact is of the utmost importance. No regulation of the three purchasing pipe-line companies was involved, wherein in accordance with long-settled practice in such cases the regulatory body may, and frequently does, pass upon the reasonableness of the purchase price of commodities or services.

The subject of this discussion, accordingly, suggests two vital and inclusive inquiries: (1) Does the Power Commission possess rate-regulatory or other jurisdiction over the production or sale of natural gas by the producer or owner thereof, consummated locally in the field and

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[1]331 U.S. 682 (1947).

[2]52 STAT. 821, 15 U.S.C.A. § 717.

in the state of origin of such gas, if such gas, at or after such local production or local sale enters the channels of interstate commerce through the facilities of others; and (2) if there be any jurisdiction over such local activities of production or sale, what is the character and extent thereof and how may such authority be exercised?

In our consideration of these questions we must start with the specific jurisdictional provisions of the Gas Act delegating authority to, and withholding authority from, the Power Commission. These provisions, of course, are foundational and they do not appear to be either ambiguous or uncertain.

The Jurisdictional Provisions of the Gas Act

The Gas Act, as indicated by its title, by the declaration of policy found in Section 1(a) thereof,[3] and by the delegation of authority and "denials of powers" set forth with particularity in Section 1(b) thereof, regulates the charges and service of every natural gas company with respect to such of its operations and activities as were subjected by the Congress *in the Act* to Commission authority. The regulation authorized is:

> The provisions of this act shall apply to the transportation of natural gas in interstate commerce,
>
> . . . to the sale in interstate commerce of natural gas for resale for ultimate public consumption,
>
> . . . to natural gas companies engaged in such transportation or sale.

There is no other grant or delegation of regulatory authority contained in the Act. There is no grant or delegation of any regulatory authority whatever over production or gathering or over any of the property, facilities, activities, operations, revenues, expenses, profits, returns or incidents thereof.

The Commission being a creature of statute of course possesses no power or authority whatever, save that which the Congress by statute has delegated to it.[4] The Natural Gas Act is the sole cachet of its au-

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[3]The title of the Act is "An act to regulate the transportation and sale of natural gas in interstate commerce, and for other purposes." In § 1(a) is found the following declaration of policy: ". . . it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest." See footnotes 15 and 16 and relevant text *post*.

[4]Panhandle Eastern Pipe Line Co. v. Fed. Power Comm., 324 U.S. 635 (1945); U. S. v. Chicago, M.St.P.&P.R. Co., 294 U.S. 499 (1935).

thority. The Congress additionally enacted "specific denials of power to the Commission," which denials can not be construed into either additional grants or delegations of authority, or as enlargements of any specific grant or delegation expressly made.[5]

The statutory "specific denials of power" here material are:

> The provisions of this Act . . . *shall not apply to any other transportation* or sale of natural gas . . ."
>
> The provisions of this Act . . . *shall not apply . . . to the production or gathering* of natural gas. [Italics added.]

These denials of authority certainly disclose neither expression nor intent to grant, but only the purpose to withhold authority.

A "natural gas company" is defined by Sec. 2(5) as "a person engaged in the transportation of natural gas in interstate commerce, or in the sale in interstate commerce of such gas for resale." You will note the term *"engaged in transportation* in interstate commerce" describes a physical operation and that the later words *"such* gas" identify the sale in interstate commerce as the sale of the gas theretofore transported in interstate commerce. The definition of "interstate commerce" in Sec. 2(7) is the one usually found in federal statutes relating to "commerce . . . among the several states," namely: "commerce between any point in a State and any point outside thereof."

The foregoing provisions of Section 1(b) and Section 2 comprehend the entire jurisdictional structure of the Act. Taken together they measure the authority delegated to and the authority withheld from the Commission by Congress. Jurisdiction is not delegated or withheld by mere definition, without regard to or in derogation of the express and specific enacted grants of authority and denials of power which Congress has declared shall control all the provisions of the act.

Now we have before us a unanimous decision of the Supreme Court which undertakes to resolve and settle all possible questions of jurisdiction which could arise under the facts, circumstances and issues presented in the *Interstate* case.

With such a Congressional enactment, in the provisions of which admittedly the jurisdiction of the Power Commission, whatever it may be, must find its warrant and authority, and with such a sweeping decision of the Supreme Court declaring the reaches of that statutory authority, it

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[5]See, Conn. L. & P. Co. v. Fed. Power Comm., 324 U.S. 515 (1945).

would seem that the answers to our two inquiries should be readily forthcoming. Such, however, is not the case. On the contrary, the answer to each of such questions presently is clouded with great doubt and much uncertainty. The immediate prospect is endless controversy and a partial creeping paralysis of the natural gas industry.

Obviously, it is necessary for us to know where we are and how and why we arrived where we are before we can consider intelligently what, if anything, can be done about our present difficulties and the resulting and cumulative future consequences. Ultimately all facts and factors which impair and obstruct the production and sale of natural gas where produced and the availability of that gas elsewhere for ultimate public consumption, adversely affect the public interest, i.e., the ultimate consumer who otherwise would make use of the gas, the flow of which to him is thereby curtailed, restricted or obstructed.

Generally, in human affairs, the present is the product of the past. Accordingly, we can understand and resolve the legal problems and difficulties presently confronting the local producers, owners and vendors of natural gas, as well as virtually all others engaged in the varied activities of that industry, only if the legal history, the judicial pronouncements and other factors which have contributed to and culminated in the present state of affairs are examined, considered and appraised.

It will be found that there are now in fact three separate so-called "authoritative" arbiters of the scope and character of the regulatory jurisdiction of the Power Commission, namely: (1) The Congress; (2) the Supreme Court; and (3) the Power Commission. Each of such authorities is in conflict with each of the other two. One also finds that both the Commission and the Supreme Court have recently taken positions on such jurisdiction of the Power Commission variant, if not inconsistent, with earlier positions taken by each of such bodies respectively. The Gas Act alone remains unchanged and speaks the same language today as when it was enacted in 1938. Of course, the end result of all this authoritative conflict is not satisfactory, even to the Power Commission. That body recently declined to assume and exercise the far-reaching authority delegated to it by the Supreme Court in the *Interstate* case.[6]

In the course of such administrative and judicial legislation through the years, the Gas Act naturally and increasingly has been disregarded and overlooked, and the basic principle of our American constitutional

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[6]Substantive Rules, General Policy and Interpretations—Section 03.79, Order No. 139, Aug. 7, 1947, Docket No. R-106. See footnote 20 *post.*

system, that the federal legislative function exclusively is the prerogative of the Congress, has been forgotten. Both the Commission and the Supreme Court have been diligent to find and declare the purpose, the objective, and the intent of Congress, but both these agencies of government have failed to extend their search to any real examination of the specific jurisdictional provisions of the Gas Act as enacted. Therein and therein alone the purpose, the objective, and the intent of Congress must find expression to become the law of the land. It is equally fundamental that the retrospectively assumed and assigned purpose, objective and intent of the legislation can not be in conflict with the statute itself as enacted.

With these principles in mind and having before us the relevant provisions of the Gas Act, it is necessary that we examine the facts and issues in the *Interstate* case and the mandates of law, which, it is said, support and justify the Commission order under review in that case.

The Interstate Case

The essential facts in the *Interstate* case are not in dispute. That company produces, gathers and purchases *locally* in Monroe Field, Louisiana, substantial quantities of natural gas, which gas is sold under long-term contracts with, and delivered at field pressure after metering *locally* in the Monroe Field to, three purchasing pipe-line companies. Each of such pipe-line companies prior thereto had extended its pipe-line and compressor station facilities *into* the Monroe Field for the purchase by and delivery to it of such gas in the Monroe Field and also for the purchase by and delivery to it of other natural gas in the Monroe Field from others than Interstate Company.

Such sales and deliveries by Interstate Company locally in the Monroe Field are completed, consummated transactions, after which it is conceded by Commission and Court alike that Interstate Company has no right, title, interest, control or responsibility whatever with respect to such gas, its subsequent transportation or sale or the returns or profits derived therefrom.

After such sales and deliveries of such gas by Interstate Company locally in the Monroe Field, each of the several purchasers thereof compresses, locally in its own compressor station in the Monroe Field, the gas so purchased from and delivered by Interstate Company (together with other gas purchased from and delivered by others) and thereupon transports the gas into states other than Louisiana where thereafter it is sold for resale for ultimate public consumption. Each of such purchasing pipe-line companies, operating in different states, thus transports the gas

in question in interstate commerce and sells it in interstate commerce. Each of such pipe-line companies is subjected to Commission regulation in connection with such operations.

It is uncontradicted that all of the facilities, activities and business of Interstate Company involved in that case are local to and fully consummated and terminated in the Monroe Field, Louisiana.

The Commission, without any reference whatever to the terms of the Natural Gas Act, nevertheless concluded that the transportation by Interstate Company of natural gas "from the mouths of the wells from which it is produced" and the delivery thereof at points in the Monroe Field constituted "the transportation . . . in interstate commerce" of such gas; and that the complete and outright local Monroe Field sales of such gas by Interstate Company constituted "sale in interstate commerce of natural gas for resale." This conclusion was reached under its theory of jurisdiction, based upon the movement of the gas "in a constant flow from the mouths of the wells from which it is produced" to the points of local field sale and delivery and thereafter "all without interruption" through the compressor stations and pipe-lines of the purchasers into the channels of interstate commerce.

In support of its legal conclusions of jurisdiction, the Commission made no supporting findings of any kind, except the finding of "constant flow." Such is the record[7] upon which its rate reduction order of April 27, 1943 was entered. In and by that order all production and gathering

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[7] "(7) Interstate, as an established course of business, is engaged in the transportation, sale and delivery of natural gas purchased, produced and gathered in Monroe Field, Louisiana, to Miss. River Fuel Corp. and So. Natural Gas Co. at a point near Perryville in the State of Louisiana, and to United Gas P. O. Co. . . . at a point near Guthrie in the State of Louisiana;

"(8) The natural gas purchased, produced, gathered and transported, that is sold and delivered . . . as described in finding (7), is sold and delivered by Interstate, in each instance, pursuant to the terms of a contract which provides that the gas so sold is received by the purchaser and transported by it out of the State of Louisiana for the purpose of resale in states other than Louisiana for ultimate public consumption . . . ;

"(9) The natural gas purchased, produced, gathered, and transported, that is sold and delivered to the purchasers named in finding (7), moves in each instant in a constant flow from the mouths of the wells from which it is produced through pipe lines belonging to Interstate to the compressor station of the respective purchaser, and thence through said compressor stations into the pipe line of said respective purchaser and thus into and through states other than Louisiana as described in finding (8), all without interruption, and said gas is so destined from the moment of its production;

"(10) The transportation and sale . . . is, in each instance, the transportation and sale in interstate commerce of natural gas for resale for ultimate public consumption . . . and, therefore, subject to the jurisdiction of the Commission"; R.V.1, pp. 82-83.

properties of Interstate, including its gas reserves, were incorporated into the utility rate base at the Commission-found depreciated and depleted cost thereof, designated by the Commission as the net investment rate base. After Commission adjustment of its revenues, from such field sales, Interstate was allowed a return upon the rate base so fixed and all net revenues in excess of that amount were found to be unfair and unreasonable and eliminated by the Commission's rate reduction order. This, of course, is regulation of all the elements and incidents of production and gathering.[8]

The Supreme Court, on certiorari, ignored the finding and conclusion of the Commission that: "The transportation . . . of natural gas" by Interstate from its wells and points of purchase to the points of local delivery to the three pipe-line purchasers in the Monroe Field is the "transportation . . . in interstate commerce of natural gas."

The Court, however, did adopt and apply the Commission "constant flow" theory of jurisdiction over the field sales in question as the sole and sufficient warrant for the Commission regulatory order under review. The Court's opinion, when stripped of collateral and immaterial matter and discussion, is fully comprehended in the following excerpt therefrom:[9]

> We have no doubt that the sales are in interstate commerce . . . The Federal Power Commission found that the gas sold to the three pipe-line companies moves ". . . in a constant flow from the mouths of the wells from which it is produced through pipe lines belonging to Interstate to the compressor station of the respective purchaser, and thence through said compressor stations into the pipe line of said respective purchaser and thus into and through states other than Louisiana . . . all without interruption, and said gas is so destined from the moment of its production." The Commission further found that "the gas transported and sold by Interstate to these three pipe-line companies continues its flow in interstate commerce and, as an established course of business well known to Inter-

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[8]See *Southern Pacific Co. v. Interstate Commerce Comm.*, 219 U.S. 433 (1911). In that case the Supreme Court quickly disposed of the fiction that by labelling the act of regulation as something else and less, it ceased to be regulation. Chief Justice White, speaking for the entire Court, brushed aside the Commission contention that it had "simply taken into consideration," as here claimed, "some of the elements proper to be considered in the ultimate exertion of the lawful power to forbid an unjust and unreasonable rate and fix a reasonable one." Thereupon the Court applied the true test, that the nature and character of its order determined the substance of the power which the Commission undertook to exert in making such order.

[9]Interstate Natural Gas Co. v. Fed. Power Comm., 331 U.S. 682 (1947).

> state, is destined for resale for ultimate public consumption in . . . markets outside Louisiana."
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> Under the circumstances described by the Commission, it is clear that the sales in question were quite as much in interstate commerce as they would have been had the pipes of the petitioner crossed the state line before reaching the points of sale. . . . There is nothing in the terms of the act or in its legislative history to indicate that Congress intended that a more restricted meaning be attributed to the phrase "in interstate commerce" than that which theretofore had been given to it in the opinions of this Court. [Citations omitted.]

The issue as to whether "the sales are a part of 'production or gathering' and hence not within the Commission's power of regulation" the Court "found it unnecessary to resolve" on the assigned reason that the Court already had "held that these sales are in interstate commerce." This position of the Court appears to be lacking in logical relation, for even if it be a fact that the sales as such could have been embraced, by definition or other statutory provision, within the term "in interstate commerce," under "the flow of commerce" jurisdictional formula, Congress nevertheless did not do so, but on the other hand obviously attempted to exclude them from the regulatory authority of the Commission, by limiting strictly, in Section 1(b) of the Act, the authority delegated to that agency.

How then did the Court arrive at the conclusion that the field sales as such were in interstate commerce as a matter of law, and not sales for shipment in interstate commerce, as in fact they were?

Throughout the opinion, the Chief Justice stated and re-stated the legal conclusion that all operations and activities, whether of production, gathering, transportation or sale, however local, and although consummated and completed in the field and state of origin, legally and actually are in interstate commerce and, therefore, subject to the regulatory authority of the Commission. This assumption was indulged even though the Congress did not adopt the "constant flow" concept of jurisdiction but framed the jurisdictional provisions of the Act around the activities of persons and not upon the physical processes of nature, as is manifest from the Act itself.

That the legal conclusion of the Court is predicated upon "the constant flow" theory of jurisdiction is clear. This formula of jurisdiction subjects inevitably all local operations and activities of production, gather-

ing, transportation and local field sale of gas for shipment by the purchaser in interstate commerce, to Commission regulatory authority.

Underlying the position of the Court are the following assumptions of law which find no support in the language of the Gas Act: (1) In every delegation of authority by Congress under the commerce clause the term "in interstate commerce" includes all operations and activities, not only "in" interstate commerce, but also all collateral operations and activities "leading to," "for," "affecting," "relating to," or in "the flow," "the stream," or "the current of" that commerce, or in any other manner conceivably within the broad ambit of the Federal power over commerce among the several states, unless the Congress, both affirmatively and negatively restricts the authority delegated much more specifically and expressly than in the Gas Act. It is, of course, exceedingly difficult to perceive how Congress could have incorporated into that Act provisions of limitation and prohibition of authority more direct and unambiguous than it did employ. (2) The almost conclusive presumption now has been imposed on Congress that every enactment setting in motion federal authority under the commerce clause envelops the entire field of possible federal power. (3) The imposition of the "flow of commerce" test as the measure of jurisdiction thus becomes imperative, even though, as here, the Congress, invested as it is with all legislative power, elected not to adopt that jurisdictional formula. (4) Congress in its legislative discretion hereafter may not select and appoint such boundaries for the exercise of federal administrative jurisdiction as it chooses with respect to the particular subject matter of legislation before it. (5) All regulatory authority, the exercise of which is prohibited to the states by the commerce clause, it appears, is vested in the Power Commission, regardless of the actual statutory warrant of authority under which that agency acts.

The legal position of the Court is without precedent. It is a departure from and contrary to all legislative and judicial precedent. The Court evidently has embarked upon a novel and uncharted policy of mandating the Congress.

The learned Chief Justice undertook to justify his conclusion that "Under the circumstances described by the Commission it is clear that the sales in question were quite as much in interstate commerce as they would have been had the pipes of the petitioner crossed the state line before reaching the points of sale," by the footnote citation of *Shafer v. Farmers Grain Co.*[10] and a number of other similar decisions. In all of

[10] 268 U.S. 189 (1925).

the cited cases the sole question involved was whether certain state regulatory and revenue statutes encroached upon the broad constitutional authority over commerce among the several states delegated by the commerce clause to Congress and denied to the states. In none of such cases was there anything definitive as between those activities actually in interstate commerce and other collateral activities such as "for," "in anticipation of," "affecting," "burdening" or "obstructing" such commerce or the "flow," "stream" or "current" of that commerce, because no such issue was involved and all such activities, both direct and collateral, are comprehended in the sweeping constitutional language "commerce . . . among the several states."

Other decisions, also not responsive to the issue of jurisdiction presented,[11] are cited in the text of the opinion to support the foregoing and

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[11] *Public Utility Comm. v. Attleboro Steam and Electric Co.*, 273 U.S. 83 (1927) is fundamentally different than, and wholly inapplicable to, the facts of the *Interstate* case. In that case, the Narragansett Co. contracted to deliver electric energy generated in Rhode Island to the Attleboro Co. in Attleboro, Mass. The electric current was metered at a receiving station of the Attleboro Company in Attleboro through meters owned and maintained by Narragansett. A wholly-owned subsidiary of Narragansett, and incorporated for the purpose, received the electric energy from Narragansett at the Rhode Island-Massachusetts state line and transmitted it to Attlesboro. The transmission line for the purpose was built by Narragansett. This was a single enterprise throughout, conducted by a single company and its satellite, in which the delivery of the electric energy was made by the same company which produced that energy in Rhode Island and transmitted it in interstate commerce to the point of sale in Massachusetts. See, Attleboro S.&E. Co. v. Public Utilities Comm., 46 R.I. 496, 129 A. 495 (1925).

Missouri v. Kansas Natural Gas Co., 265 U.S. 298 (1924) is identical. The Kansas Gas Co. produced and gathered gas in Oklahoma, transported it into Kansas, where gas produced or purchased in Kansas was introduced into the pipeline system and all of the gas so accumulated transported into Missouri for sale to local distribution. This also was a single enterprise operation from beginning to end. It was this type case which the Congressional Committee indicated was the field to be regulated by the federal government.

The Chief Justice quoted from *Jersey Central Power & Light Co. v. Fed. Power Comm.*, 319 U.S. 61 (1943) that: "We see no distinction between a sale at or before reaching the state line," to support his own conclusion to that effect in the *Interstate* case. The jurisdictional issue in the *Jersey Central* case arose under Section 201(b) of the Federal Power Act (49 STAT. 847, 16 U.S.C.A. § 824), which provides that the provisions thereof "shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce." Additionally, it is provided therein: *"The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy."* Additionally, it is provided therein: *"The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy."* The term "public" utility" is defined therein as *"any person who owns or operates facilities subject to the jurisdiction of the Commission. . . ."* The foregoing provisions of the Power Act which rest the regulatory jurisdiction of the Commission under the Power Act upon the ownership or operation of facilities *for* interstate transmission or sale in interstate commerce, are not found in the Gas Act. In the *Jersey Central* case that Company, the local vendor, was found to be subject to the Power Act because it owned certain facilities extending from its generating plant to the point of sale in the State of New Jersey, which facilities were used exclusively for delivery of

further conclusions of the Chief Justice. He then states: "There is nothing in the terms of the Act or in its legislative history to indicate that Congress intended that a more restricted meaning be attributed to the phrase 'in interstate commerce' than that which theretofore had been given to it in the opinions of this Court." No such contention was made at any time in the case. The Court was asked merely to confine Commission regulatory authority within the meaning theretofore attributed to the term "in interstate commerce" by Court and Congress alike. As a matter of fact, the statutory definition is of "interstate commerce," not of "*in* interstate commerce" as might be assumed from the opinion. Nevertheless, the Chief Justice, after quoting that definition, which is the stock form embodied almost without exception in statutes authorizing the exercise of federal regulatory authority over some portion of that commerce,[12]

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electric energy to the purchaser *for* the subsequent interstate transmission and sale thereof by such purchaser. The Jersey Central Co. itself did not participate in the transmission across the state line or in the subsequent sale in the state of destination of the electric energy in question. The Supreme Court also declared in the *Jersey Central* case that "The determinative factor is the ownership of facilities used in transmission." This vital fact the Chief Justice evidently overlooked in the *Interstate* case, for there are no comparable provisions in the Gas Act. No part of the jurisdiction of the Power Commission under the Gas Act is predicated upon the ownership or operation of facilities. The jurisdiction of the Commission under that Act is dependent upon enumerated activities. Under such circumstances the *Jersey Central* case is quite irrelevant to the issue of jurisdiction involved in the *Interstate* case.

Similarly, *Ill. Natural Gas Co. v. Central Ill. Public Service Co.*, 314 U.S. 498 (1942) and *Peoples Natural Gas Co. v. Fed. Power Comm.*, 75 U.S.App.D.C. 235 (1926), cited in the *Interstate* opinion, involve single integrated enterprises of affiliated companies from the producing wells in one state to the points of distribution in other states. They are neither analogous nor material to the jurisdictional issue under discussion. The Chief Justice mentioned the Commission finding "that the petitioner was an affiliate of one of the three purchasing companies," but did not pursue it, evidently because it was wholly inapplicable to the other two purchasing companies.

[12]As illustrative of the fact that the definition of "interstate commerce" used in the Gas Act is the usual one commonly used by Congress, irrespective of the extent of federal authority exercised in any particular statute, see Commodity Exchange Act, 42 STAT. 998, 7 U.S.C.A. § 2; Packers and Stockyards Act, 42 STAT. 159, 7 U.S.C.A. § 182; Perishable Agricultural Commodities Act, 48 STAT. 585, 7 U.S.C.A. § 499(a); The Tobacco Inspection Act, 49 STAT. 735, 7 U.S.C.A. § 511; Federal Trade Commission Act, 52 STAT. 111, 15 U.S.C.A. § 44; Federal Caustic Poison Act, 44 STAT. 1406, 15 U.S.C.A. 402; Interstate Transportation of Petroleum Products Act, 49 STAT. 30, 15 U.S.C.A. § 715(a); Federal Fire Arms Act, 52 STAT. 1250, 15 U.S.C.A. § 901.

In other Congressional enactments where the coverage of the act is intended to embrace activities not "in" interstate commerce but within the constitutional concept of "commerce . . . among the several states," the term "commerce" or "interstate commerce" is enlarged by definition or other statutory provisions to cover "trade, traffic, commerce, transportation or communication *among the several states*", thus paraphrasing "the commerce clause" of the Constitution. See National Labor Relations Act, 49 STAT. 449, 29 U.S.C.A. § 151; The Fair Labor Standards Act, 52 STAT. 1060, 29 U.S.C.A. § 201; Securities Act of 1933, 48 STAT. 74, 15 U.S.C.A. § 77(b); Securities Exchange Act of 1934, 48 STAT. 882, 15 U.S.C.A. § 78(c); Public Utility Holding Company Act of 1935, 49 STAT. 804, 15 U.S.C.A. § 79(b);

concluded: "There is nothing in that language to suggest that Congress intended the sales consummated before the gas crosses a state line should not be regarded as 'in' interstate commerce." There is no such presumption of jurisdiction. It may be added there is nothing in that language or any other language of the Act, to suggest that Congress intended that such sales should be regarded as "in" interstate commerce.[13]

Established Meaning of Terms as Used by Congress and the Supreme Court

The foregoing arguments and conclusions of the Chief Justice conflict directly with the long-settled principles of statutory construction repeatedly declared and applied by that Court in considering and determining the scope of federal statutes relating to interstate commerce. The standard and long-established technique of legislative draftsmanship employed by the Congress also reflects and follows those same principles. Under these principles the use of the term "in" with reference to interstate commerce in Congressional enactments means just that. It does not include or mean "for," "affecting," "burdening," "obstructing," or the "flow," "stream" or "current" of interstate commerce.

Investment Company Act of 1940, 54 Stat. 857, 15 U.S.C.A. § 80b-1; Sherman Anti-Trust Act of 1890, 26 Stat. 209, 50 Stat. 693, 15 U.S.C.A. 1 *et seq.*

[13]The jurisdiction of a statutory agency such as the Power Commission, and the scope and character of that jurisdiction, must apply affirmatively and specifically under the provisions of the authorizing statute. The order of such an agency is void unless supported by findings of the basic facts conditioning its power. *U.S. v. Chicago, M.St.P.&P.R.Co.,* 294 U.S. 499 (1935); *Panhandle Eastern P. L. Co. v. Fed. Power Comm.,* 324 U.S. 635 (1945). Moreover, the "shall not" provisions of the act constitute commands which forbid and are "a limitation on jurisdiction and a legal standard that must be given effect." As stated by Justice Jackson in *Conn. L.&P.Co. v. Fed. Power Comm.,* 324 U.S. 515, 529 (1945): "The Commission must observe, and the Courts must enforce" them. That case related to the analagous structure of the jurisdiction provisions of Sec. 201(b) of the Federal Power Act.

It is important to bear in mind that the "shall not apply" commands of the Act exclude from the regulatory jurisdiction of the Commission certain operations and facilities of a "natural gas company," which otherwise might be subject to the regulatory jurisdiction of that body. Stated otherwise, if a company be not engaged either in the transportation of natural gas *in* interstate commerce or in the sale *in* interstate commerce of natural gas for resale, that company in no event would be liable in any degree, or at all, to the regulatory authority of the Commission. Accordingly, the "shall not apply" provisions of Section 1(b) of the Act serve no purpose with respect to such a company. Such provisions can serve only to limit the regulatory authority of the Commission over the excluded facilities and operations of a "natural gas company," which otherwise might be subject, as to such facilities and operations, to Commission regulation. The only meaning that can be attributed to the "denials of power" in Section 1(b) of the Act over "any other transportation or sale" is that the Act refers to any transportation or sale other than transportation or sale actually "in" interstate commerce, that is, transportation or sale affecting or in the stream of commerce. Both "transportation" and "sale" which are not in the stream of interstate commerce and do not affect such commerce are beyond the reach of federal power. Certainly Congress did not indulge the idle gesture of declaring that the provisions of the Act should not apply to operations and activities outside of and beyond the ambit of the commerce clause.

Throughout the years, and literally in scores of statutes, whenever Congress has undertaken to subject to federal regulation, control or prohibition, certain activities and operations which are not actually "in" interstate commerce but which affect, burden or obstruct it, or are in the flow, stream or current of that commerce, or in some other manner are related thereto, that body, by apt language in enlargment of the term "in interstate commerce," has included such collateral activities and operations within the coverage of the legislation in the exercise of its sweeping constitutional power over "commerce . . . among the several states." In all such cases Congress *finds, declares and enacts* that such collateral local operations and activities, including local sales and deliveries, do affect, burden or obstruct interstate commerce, or that the regulation thereof is necessary and appropriate to promote, foster and protect such commerce and the free and orderly current and flow thereof.[14] Nothing in the

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[14]Such Congressional technique of statutory draftsmanship, extending the exercise of Federal authority over "interstate commerce" beyond that which actually is "in interstate commerce," also is disclosed by the following.

The Congressional declaration that an activity or article of commerce "shall be considered to be in interstate commerce if such commodity is part of that current of commerce usual in the trade," or similar phraseology such as "free flow of goods in commerce," is found among others in the Packers and Stockyards Act of 1921, 42 STAT. 160, 7 U.S.C.A. § 2; the Commodity Exchange Act, 49 STAT. 1491, 7 U.S.C.A. § 1 *et seq.*; The Grain Futures Act, 42 STAT. 998, 7 U.S.C.A. §§ 1-17; the Perishable Agricultural Commodities Act, 48 STAT. 585, 7 U.S.C.A. § 499(a); the Tobacco Inspection Act, 49 STAT. 735, 7 U.S.C.A. § 511; the Fair Labor Standards Act of 1938, 52 STAT. 1060, 29 U.S.C.A. §§ 201 *et seq.*; the National Labor Relations Act, 49 STAT. 449, 29 U.S.C.A. §§ 151 *et seq;* and the Securities and Exchange Act of 1934, 58 STAT. 881, 15 U.S.C.A. § 78ee.

Among the many other statutory terms of enlargement commonly used are: "burden and obstruct the normal channels of commerce," "affect interstate commerce," "ship or deliver for shipment in interstate commerce," "transported or intended to be transported in interstate commerce," "engaged in commerce or in the production of goods for commerce," "stored for interstate commerce," "when offered for interstate shipment," "for the purpose of or in connection with a transaction or shipment in commerce," "transport, ship or receive in interstate commerce," "in restraint of trade or commerce among the several States," "the use of the mails and instrumentalities of interstate commerce," "affect the interstate commerce in which those companies engage," "affect trade, commerce, transportation or communication among the several States," "affect interstate commerce in coal," "burdens and affects the flow of commerce." See: Agricultural Adjustment Act, 50 STAT. 246, 7 U.S.C.A. § 601; Grain Standards Act, 39 STAT. 482, 7 U.S.C.A. § 71 *et seq;* Investment Advisers Act, 1940, 54 STAT. 847, 15 U.S.C.A. § 80b-1—b-21; Nat. Labor Relations Act, *supra;* Public Utility Holding Co. Act of 1935, 49 STAT. 803, 15 U.S.C.A. §§ 79 *et seq.;* Fed. Caustic Poison Act, 44 STAT. 1406, 15 U.S.C.A. §§ 401 *et seq.*; Fair Labor Standards Act of 1938, 52 STAT. 1060, 29 U.S.C.A. §§ 201 *et seq.*; Cooperative Marketing Act, 44 STAT. 802, 7 U.S.C.A. §§ 451 *et seq.*; U. S. Warehouse Act, 42 STAT. 532, — U.S.C.A. —; Cotton Standards Act, 42 STAT. 1517, 7 U.S.C.A. §§ 51 *et seq.*; Assocs. of Producers of Agricultural Products Act, 42 STAT. 388. 7 U.S.C.A. § 291; Securities Act of 1933, 48 STAT. 74, 15 U.S.C.A. § 77(b); Securities and Exchange Act of 1934, *supra;* Investment Co. Act of 1940, 54 STAT. 857, 15 U.S.C.A. § 80b-1; Discrimination Against Farmers' Cooperative Assocs. Act, 44 STAT. 1423, 15 U.S.C.A. § 431; Interstate Transportation of Petroleum Products Act, 49 STAT. 30, 31, 15 U.S.C.A. § 715a; Bituminous Coal Act of 1937, 50 STAT. 72, 83, 15 U.S.C.A. §§ 828 *et seq.*, 26 U.S.C.A. §§ 3520 *et seq.*; Fed-

language of Sections 1(b) and 2 of the Gas Act is remotely similar to the language of enlargment employed by Congress when that body wishes by statute to extend the coverage of the federal regulation authorized to local operations and practices not actually "in" interstate commerce. Local sales and deliveries of natural gas and other commodities and services, and the production, gathering and marketing of such gas locally, as well as the local gathering, processing, manufacturing and marketing of commodities and products, all are illustrative of collateral activities which may be "in the current of" or "affect" interstate commerce and so subject to federal control, *if Congress so elects,* and manifests that election by appropriate, adequate and express statutory provisions in that behalf.

The Gas Act neither requires nor admits of aids in interpretation to draw its meaning from it. The local sales in question within the plain meaning of its simple, explicit and positive terms are not subject to the regulatory authority of the Power Commission.

In a number of recent cases the distinction between those activities which are "in" interstate commerce and other activities which "affect" or "burden" or are in the "flow", "stream" or "current" of such com-

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eral Fire Arms Act, 52 STAT. 1250, 15 U.S.C.A. § 901; Sherman Anti-Trust Act, 50 STAT. 693, 15 U.S.C.A. § 1.

Such Congressional differentiation and technique of statutory draftsmanship is strikingly illustrated in the Public Utility Act of 1935, *supra,* in which Act are incorporated as separate integrated enactments the Public Utility Holding Co. Act of 1935 (Title I), and the Federal Power Act (Title II). In the Holding Co. Act, Congress, desiring to enlarge the jurisdiction of the Securities and Exchange Commission to embrace "activities which directly affect or burden interstate commerce" in addition to "interstate commerce" itself, did so expressly and specifically. 49 STAT. 803, 804, 15 U.S.C.A. § 79 (c). This is in direct contrast with the restricted jurisdictional provisions of the Gas Act.

In other statutes the differentiation between that which is "in" interstate commerce and that which is a part of "commerce . . . among the several states" is sharply highlighted by such terminology as the following: "ship or deliver for shipment," Federal Caustic Poison Act, *supra;* "transported or intended to be transported in interstate commerce," Discrimination Against Farmers Cooperative Associations by Boards of Trade Act, *supra;* "shipment or transportation in interstate commerce," Interstate Transportation of Petroleum Products Act, *supra*; "transport, ship or receive in interstate commerce," Interstate Transportation of Fire Arms Act, *supra*; "ship or deliver for shipment in interstate commerce," Grain Standards Act, 39 STAT. 482, 7 U.S.C.A. 76; "ship or deliver for shipment from one state into any other state," Nursery Stock and Other Plants and Plant Products Act, 37 STAT. 319, 7 U.S.C.A. 158; "transported or intended to be transported in interstate commerce," Cooperative Marketing Act, *supra*; "for the purpose of or in connection with a transaction or shipment in commerce," Cotton Standards Act, *supra.*

When Congress wishes to extend and enlarge the coverage of an act under the interstate commerce clause to include the flow or current of commerce, it so declares directly and unmistakably. See, among others, Commodities Exchange Act, *supra,* Packers and Stock Yards Act, *supra,* Tobacco Inspection Act, *supra,* Perishable Agricultural Commodities Act, *supra.*

merce, or which in some other manner relate to interstate commerce, again has been clearly differentiated by the Supreme Court.[15]

The case of *McLeod v. Threlkeld* involved the jurisdictional reaches of the Fair Labor Standards Act. Mr. Justice Reed, speaking for the Court, declared:

> In drafting legislation under the power granted by the Constitution to regulate interstate commerce and to make all laws necessary and proper to carry those regulations into effect, Congress is faced continually with the difficulty of defining accurately the precise scope of the proposed bill. In the Fair Labor Standards Act, Congress did not intend that the regulation of hours and wages should extend to the furtherest reaches of federal authority. The proposal to have the bill apply to employees "engaged in commerce in any industry affecting commerce" was rejected in favor of the language now in the Act, "each of his employees who is engaged in commerce or in the production of goods for commerce." The selection of the smaller group was deliberate and purposeful. . . .
>
> There is no single conception of interstate commerce which can be applied to every federal statute regulating commerce.

In *Federal Trade Commission v. Bunte Bros., Inc.,* Mr. Justice Frankfurter delivered the opinion of the Court, and with respect to the issue of the jurisdiction of that agency stated:

> This case presents a narrow question of what Congress did, not what it could do, and we merely hold that to read "unfair methods of competition in [interstate] commerce" as though it meant "unfair methods of competition in any way affecting interstate commerce," requires, in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished.

The Supreme Court, after prescribing the rigid jurisdictional test of "constant flow," which in its application and consequences inevitably wipes out all the statutory limitations of authority and denials of power contained in Section 1(b), goes further and imposes a supplemental and extraordinary measure of jurisdiction, which likewise is not embodied in the Act and which similarly finds its warrant in the vagaries of asserted

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[15]Roland Electricla Co. v. Walling, 326 U.S. 657 (1945); Fed. Trade Comm. v. Bunte Bros., Inc., 312 U.S. 349 (1941); McLeod v. Threlkeld, 319 U.S. 491 (1943).

"intent," "purpose" and "objective" of the legislation, not manifest in the provisions thereof.

Perhaps in deference to the quite unusual reasoning of Mr. Justice Douglas in the case of *Colorado Interstate Gas Co. and Canadian River Gas Co. v. Federal Power Comm.*,[16] it is contended by the Chief Justice in the *Interstate* case that the measure of the regulatory authority of the Commission under the Gas Act is limited only by the "powers of regulation in areas in which the States are constitutionally competent to act." The limits of such authority of the states, it is said by Mr. Justice Douglas in the *Canadian* case as well as by the Chief Justice in the *Interstate* case, amounts to "the power to regulate the physical production and a gathering of natural gas in the interests of conservation or any other consideration of legitimate local concern." Continuing, the Chief Justice declared that "the jurisdiction of the Power Commission does not attach" when it is "inconsistent or a substantial interference with the exercise by the State of its regulatory functions. But such conflict must be shown."

What is the content of the quoted language of the Chief Justice? Just this, that the Act reserves to the States their constituional powers and authority, of which lawfully they may not be deprived; that the Power Commission is authorized and directed to occupy the entire area of permissible federal power under the commerce clause; additionally, the Commission jurisdiction is said to attach beyond that permissible area of federal constitutional authority to the point that it is "inconsistent or a substantial interference with the exercise by the State of its regulatory funcions," that is, "in areas in which the States are constitutionally competent to act"; and finally the amazing conclusion that "such conflict must be clearly shown" to curtail or prevent Commission action. The jurisdictional provisions of the Gas Act, as well as the preliminary declaration of the necessity for federal regulation of transportation and sale of natural gas in interstate commerce, are silent as to the respective spheres of federal and state regulation of the natural gas industry.

The foundations of the doctrine announced are not laid or discernible in any principles of law or rules of Congressional action heretofore declared or promulgated; they are not found in the Gas Act; and they are foreign both to the spirit and structure of our constitutional government. They reflect the ideology of personal government, which as always is assumed to be benevolent and in the public interest.

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[16]324 U.S. 581 (1945).

The Canadian River and Cities Service Cases

The theory of jurisdiction announced in the *Interstate* case is variant from and inconsistent with the theory of jurisdiction announced by Mr. Justice Douglas in the *Canadian River Gas Company* case.[17] Three Justices concurred with Mr. Justice Douglas in his conclusion that notwithstanding the express jurisdictional limitations and restraints of the Act, nevertheless the Power Commission is possessed of complete and inclusive rate-regulatory authority over all the operations, business and properties of an interstate pipe-line company, including its natural gas reserves and the production and gathering of gas therefrom. The late Chief Justice Stone, with whom three Justices of the Court concurred, declared that, by the explicit and mandatory provisions of the Act, the Commission was denied rate-regulatory authority over the business and activity of production and gathering of natural gas, including the production, properties and reserves. Mr. Justice Jackson concurred in confirming the Commission order in that case, but insisted that the Commission inclusion in the utility rate base of all operations, revenues and properties of the utility there involved, including the gas reserves and the production of gas therefrom, did not constitute direct regulation of "production or gathering of natural gas" but stated that if it did constitute such regulation, the Commission would "have exceeded its jurisdiction." As opposed to Mr. Justice Jackson, the eight other Justices of the Court agreed on one point—that the treatment given to the production and gathering operations, revenues and properties of Canadian was in fact direct rate regulation.

The Court disposed of the *Canadian River Gas Company* case by three divergent opinions in which the alignment of the Court was five to four that the Commission does not have jurisdiction over "any direct regulation of that activity." The same opinions, on the basis of eight to one, recognized that "reflecting the production and gathering facilities in the rate base" in fact was the exercise of direct regulation of that activity.

Precisely the same regulatory control, procedure and order were applied to the production and gathering properties and to the local business of Canadian, and to Interstate Company as well, as to the admittedly regulable properties and business of each of such companies. Regulation is regulation by whatever name it may be designated.

Briefly stated, Mr. Justice Douglas and his associates did not predicate Commission jurisdiction upon "constant flow" or current of commerce from the wells into the channels of interstate commerce. His pre-

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[17] *Ibid.*

mises were that: "transportation and sale do not include production or gathering"; that "when Congress designed the Act it was thinking in terms of the ingredients of a rate base"; that production and gathering facilities were not excluded from the rate base; that the Commission is not precluded from using the rate base method, although it may "have authority to depart" from it; therefore, the Act authorizes the inclusion of the production and gathering operations, revenues and properties in the rate base and Commission rate reduction order. He buttressed his conclusions by reference to various nonjurisdictional provisions of the Act, not necessary here to consider, and concluded: "We must read Section 1(b) in the context of the whole Act. It must be reconciled with the explicit provisions which describe the normal conventions of rate making." Strangely enough, the learned Justice indicated the Commission may not be required to follow this method, even though he read Section 1(b) out of the Act on the assumption that the Act itself was designed and framed on the rate base method. He then pays final tribute to Section 1(b) as follows:[18]

> That does not mean that the part of Sec. 1(b) which provides that the Act shall not apply "to the production or gathering of natural gas" is given no meaning. Certainly that provision precludes the Commission from any control over the activity of producing or gathering natural gas. For example, it makes plain that the Commission has no control over the drilling and spacing of wells and the like. It may put other limitations on the Commission.

Thus the statutory delegation of authority to the Commission was vastly enlarged and the denials of power to that agency virtually were obliterated by four Justices of the Supreme Court.

In this state of the law the *Cities Service Gas Company* case,[19] was carried to the Supreme Court on petition for certiorari to review a Commission rate reduction order. The Commission had treated the production and gathering operations, business and properties of the Cities Service Gas Company identically as it had treated operations, business and properties of Canadian River Gas Company. Yet certiorari was denied[20] in the face of the settled law, recently redeclared by the Supreme Court, the Court speaking through Mr. Justice Douglas, that:[21]

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[18] *Id.* at 602, 603.
[19] 155 Fed.2d 694 (C.C.A. 10th 1946).
[20] 67 Sup.Ct. 489 (1947).
[21] U.S. v. Pink, 315 U.S. 203 (1942).

> . . . the lack of an agreement by a majority of the Court on the principles of law involved prevents it [the decision] from being an authoritative determination for other cases.

Development of the Structure of the Gas Act

Since both the Power Commission and the Supreme Court constantly are declaring the purpose, intent, and objective of the Congress in enacting the Gas Act, other than as disclosed by the Act itself, attention is directed to certain highly significant facts relating directly to the historical development of the structure of the legislation. Commission and Court alike in their respective studies and searches for the Congressional viewpoint and motivation, evidently have failed to consider and certainly have not commented upon the following succession of events.

In the establishment of federal regulation over interstate electric and natural gas utilities, the Congress followed its own long established and standard procedures and statutory provisions, in the parallel and virtually identical delegations of jurisdiction to the Commission in the Federal Power Act and in the Natural Gas Act, respectively. The legislative development of these laws from the original drafts thereof as proposed by the Commission to the statutory structures as finally adopted, reflects unmistakably the explicit and obvious meaning, force and effect of the jurisdictional provisions of each thereof. Such legislative matters and facts may be relevant and material to, and of great weight in, the determination of the propriety and legality of asserted authority thereunder, if and only if the terms of the enactments are clouded with ambiguity.[22]

Both the Natural Gas Act and the Federal Power Act, including the jurisdictional sections of each, were drafted by the Federal Power Commission, and as so drafted were introduced and the enactment thereof actively sought by the Commission before the Congress.[23] Title II of each bill was the Commission-drafted Federal Power Act, while Title III of each bill was the Commission-drafted Natural Gas Act.

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[22]U.S. v. Dickerson, 310 U.S. 554, 561 (1940); U.S. v. Amer. Tkng. Assocs., 310 U.S. 534, 543 (1940); Conn.L.&P. Co. v. Fed. Power Comm., 324 U.S. 515 (1945).

[23]Hearings, House Committee on Interstate and Foreign Commerce, H.R. 5423, 74th Cong., 1st Sess., Test. Comm'r Seavey, Fed. Power Comm. pp 400-401, March 7, 1935. Conn. L.&P. Co. v. Fed. Power Comm., *supra* note 22. H.R. 5423, 74th Cong. 1st Sess., Feb. 6, 1935; S. 1725, 74th Cong., 1st Sess., Feb. 6, 1935. Hearings, Subcommittee House Committee on Interstate and Foreign Commerce, H.R. 11662, 74th Con., 2nd Sess., Tes. Solicitor DeVane, Fed. Power Comm., p. 10, April 2, 1936.

In the jurisdictional sections of the Commission-drafted legislative bills, entitled "Application of Title,"[24] in addition to the regulation of "the transmission and sale" of natural gas *"in* interstate commerce," federal jurisdiction also was to follow the "flow" of electric energy and natural gas through "all facilities connected" with any system or facilities actually devoted to the transmission and sale of natural gas "in interstate commerce." The Commission draft of the Gas Act is silent as to "production or gathering."

By the Commission drafts of the Gas Act and the Power Act, all possible jurisdiction of the Federal Government over "commerce among . . . the several states," which includes all activities "in," "affecting" or in "the flow" of that commerce, were to be delegated to that agency.

However, *all* the various Commission proposals thus to extend federal regulation beyond transportation and sale "in interstate commerce" were discarded and rejected by Congress in the Power Act, as enacted in 1935, and in the Gas Act, as enacted in 1938.

Not only was the "flow" theory, through interconnected facilities, stricken from the enacted Gas Act, but the catch-all phrases "as a part of interstate commerce" and "that part of such business which is not subject to regulation by the States" also were eliminated by Congress. Additionally, to define and to confine federal regulation to transportation and sale "in interstate commerce," the Congress elected to specify in the Gas Act as enacted that "The provisions of this Act . . . shall not apply to "*any other* transportation or sale . . . or to the production or gathering of natural gas." [Italics added.]

During the interval from 1935 to 1938, additional drafts of legislative bills "to regulate the transportation and sale of natural gas in interstate commerce" were introduced in Congress.[25] In each of such subsequent legislative bills the regulatory authority proposed to be lodged in the Federal Power Commission was further limited and restricted. It is significant, however, that in 1937, as a companion measure to and considered at the same time as H.R. 4008,[26] there was introduced a bill entitled "A Bill to Aid the Several States in the Proper Conservation, Orderly Production and Procurement of Natural Gas for Interstate Commerce . . ."[27]

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[24]Natural Gas Act as drafted by Commission (1935), §§ 301(a), (b), 201(a); H.R. 5423, 74th Cong., 1st Sess., Feb. 6, 1935; S. 1725, 74th Cong., 1st Sess., Feb. 6, 1935. Hearings, House Committee on Interstate Commerce, Feb. 19, 1935, pp. 43, 31.

[25]H.R. 11662, 74th Cong., 2d Sess., 1936; H.R. 4008, 75th Cong., 1st Sess., 1937.

[26]Hearing, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., March 24, 1937; H.R. 4008, pp. 10-20.

[27]Therein (H.R. 5711, 75th Cong., 1st Sess.) among other things, it was declared: "The provisions of this Act shall apply to the procurement of natural gas

In the foregoing legislative proposal, which thereafter died in committee, the broad sweep of federal authority over commerce in natural gas "among the several states" again was sought to be delegated in full measure to the Federal Power Commission, just as in the Commission-drafted proposal of 1935. There was this difference, however, that in the 1937 proposal, by express declaration, production and gathering were to be within the coverage of the proposed Commission authority, as well as all facilities and activities "which substantially affect such interstate transportation and sale or exchange of natural gas."

Thus, in the 1935 and 1937 proposals, both rejected by Congress, is found the precise pattern of the asserted jurisdiction exercised by the Commission in the *Interstate* case. No such jurisdictional foundation is laid or apparent in the Gas Act, as enacted.

Consideration has been directed in considerable detail to the background of and the reasoning of the Supreme Court in the *Interstate* and *Canadian* cases, that it may be clear how far afield that Court has gone to support the Commission-asserted jurisdiction. It shows the extreme difficulty of the situation and suggests that the present ideology of the entire Court is such that the possibility of any relief from that source is extremely remote.

The Variable Positions of the Power Commission

The Power Commission, presently as heretofore, assumes to determine for itself the scope and character of its jurisdiction under the Gas Act.

In 1943, the Commission found it necessary to declare and apply the "constant flow" of commerce concept as the measure of its jurisdiction, to enable it to regulate the local field sales of natural gas by Interstate Company to three pipe-line companies, which companies thereupon transported such gas to other States and there sold it for resale.

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for the purpose of its transmission through pipe lines and its sale, exchange, transmission, or distribution in interstate commerce; also to all instrumentalities, including contracts and agreements which substantially affect such interstate transportation and sale or exchange of natural gas.

"The Commission shall have jurisdiction over all facilities for the procurement of natural gas for its transmission through pipe lines and its sale, or for exchange, or distribution in interstate commerce, and over the transmission of natural gas in pipe lines in interstate commerce and over the sale, or exchange, of natural gas in interstate commerce and over all facilities connected therewith as parts of a system of natural-gas transmission operated in more than one State." Hearing, House Committee, Interstate and Foreign Commerce, H.R. 4008, 75th Cong., 1st Sess., p. 11.

In 1940, this same concept theretofore had been considered by the Commission in *Re Columbian Fuel Corporation.*[28] Columbian produced and gathered gas in several counties in Kentucky, which it sold outright and delivered at the terminal of Columbian's gathering lines to the Warfield Natural Gas Company in Kentucky. Warfield sold most of such purchased gas to others, by whom it was transported out of the State of Kentucky into West Virginia and Maryland, and subsequently again sold in such states for ultimate distribution to the public. Columbian was not engaged in any activities or operations except in Kentucky and only those of production, gathering and local sales above mentioned. The Commission found that "There is a regular unbroken and uninterrupted transmission and a continuous flow of the natural gas" sold by Columbian to Warfield "from the areas in Kentucky to destinations in other states" and "as an established course of business." The Commission concluded that the local sales by Columbian were "sales in interstate commerce for resale"; "that Congress did not intend to exclude all production and gathering from the regulatory authority of the Commission"; and that it was not the intention of Congress to subject to regulation under the Natural Gas Act all persons "whose sales of natural gas in interstate commerce, as in this case [*Columbian*], are made as an incident to and immediately upon completion of such persons' production and gathering of said natural gas and who are not otherwise subject to the jurisdicion of ths Commission." The Commission thereupon disclaimed jurisdiction over Columbian by "making a choice between the broader and narrower interpretation of its jurisdiction under the Natural Gas Act," in favor of the narrower interpretation, because, as further stated by the Commission, "a determination in favor of the broader conception of its jurisdiction would lead the Commission into attempts to deal with the complicated inter-relationship between the natural gas industry and the oil industry," which "would require statutory authority of much wider scope and machinery exceeding that at the disposal of the Commission . . ."

Thereafter, also in 1940, on an application for determination of status, the Commission held that Billings Gas Company and Ohio Oil Company[29] were natural gas companies under the Act and not exempt under Section 1(b) because "the flow of natural gas through interconnected facilities . . . to points of local distribution in Montana is a continuous transportation of natural gas in interstate commerce." The findings of fact supporting this conclusion were:

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[28]2 F.P.C. 200, 38 P.U.R. (n.s.) 3 (1940).
[29]Billings Gas Co., 2 F.P.C. 228, 38 P.U.R.(n.s.) 321.

> The Ohio Oil Company produces and gathers natural gas in the State of Wyoming, transports the same from the termini of the gathering lines to the Wyoming-Montana state line, and there sells and delivers the gas to the Billings Gas Company, which in turn transports the same through a transmission pipe line to Billings, Montana, and to other cities and towns where it is resold for ultimate public consumption.

The further fact not mentioned in the opinion, that Billings was a wholly-owned subsidiary of Ohio apparently did not influence the Commission. According to the Commission record of the case, the delivery was made by Ohio to Billings after the completion of gathering by Ohio and at a point stated by the Commission to be 3908 feet from the termini of the gathering lines of Ohio. The finding of transportation after completion of gathering could have been made with equal finality and facility by the Commission on the basis of 390 feet, 39 feet, 9 feet, or .9 feet.

These decisions of the Commission, as to which the Supreme Court declared in the *Interstate* case, "We express no opinion as to the validity of the jurisdictional tests employed by the Commission in these cases," aptly illustrate the flexible, elastic and self-controlled jurisdiction, to be exercised or not in particular cases at the discretion of the Commission. If a truly intrastate movement or sale be treated as a part of a later or earlier interstate movement and sale, it is difficult, if not impossible, to avoid bringing virtually all transportation and sale within the compass of the Commission's power, notwithstanding the jurisdictional limitations, denials and prohibitions embodied in the Act.

From the time of the Commission opinion and order in the *Interstate* case and accentuated by the opinion of Mr. Justice Douglas in the *Canadian* case, great and widespread doubt and fear developed among all producers of natural gas as to what limitations, if any, there were upon the rate-regulatory authority of the Commission over the production or gathering of natural gas. As a result, during the years 1945, 1946, and in the early months of 1947, the Commission, speaking through its members and other representatives, gave repeated assurances that it "has no jurisdiction over the independent producer and cannot regulate the rates at which it sells gas to the pipeline company."[30]

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[30]General Counsel for the Federal Power Commission, speaking for and from the viewpoint of the Commission, before the Interstate Oil Compact Commission, Oklahoma City, Oklahoma, June 15, 1945, under the subject title of "Effect of Recent Supreme Court Decisions on the Production and Conservation of Natural Gas," categorically declared the coverage of the Act and the position of the Commission to be as follows:

". . . it should be emphasized that there was no dispute with respect to the gas which the pipeline company purchased from independent producers. The price paid

In May, 1947, after the argument in and before the announcement by the Supreme Court of its decision in the *Interstate* case, two opinions (Nos. 149 and 150) were released by the Commission, entitled *In the Matter of the Fin-Fer Oil and Gas Production Company*,[31] and *In the Matter of Tennessee Gas and Transmission Company and The Chicago Corporation*.[32] In both of these cases the Commission concluded, on the authority of the *Columbian Fuel Corporation* case, that neither the Fin-Fer Company nor The Chicago Corporation was a natural gas company subject to its jurisdiction, its conclusion in that behalf being that:

> . . . where a person not otherwise subject to the jurisdiction of the Commission, is engaged in production or gathering of natural gas exclusive of its transportation in interstate commerce and makes arm's length sales and deliveries of natural gas in interstate commerce as an incident to or upon completion of that persons' production or gathering, the provisions of the Natural Gas Act do not apply.

The *Interstate* case was distinguished by the Commission on the following grounds: Interstate was "otherwise subject to the jurisdiction of the Commission";[33] the State of Louisiana had no jurisdiction over

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for such gas, being at arm's length, was allowed as an operating expense of the pipeline company. The Commission, of course, has no jurisdiction over the independent producer and cannot regulate the rates at which he sells gas to the pipeline company. Not only is the Commission's rate-making authority limited to the transportation and sale of natural gas for resale in interstate commerce, but Congress specifically provided in Section 1(b) of the Act that the Commission . . . shall not have jurisdiction over the 'production or gathering of natural gas.' As Mr. DeVane, the Commission's Solicitor, explained in the committee hearings on one of the predecessor bills, the Commission has no authority over the price 'that is paid to the gatherer, the man that produces it; that is binding if the transaction is at arm's length.'" [Hearings on H.R. 11662, 74th Cong., 2d Sess., pp. 42-43.]

"The issue is therefore limited to the gas which the interstate pipeline company itself produces and the question is whether the company should be allowed the actual costs which it incurs in producing such gas or whether the latter should be 'valued' as a commodity at the point where it enters the company's pipeline."

See also, Federal Power Commission Staff Report (1947), Docket G-580, entitled "Section 1(b) of the Natural Gas Act with reference to Production and Gathering." This is an argument in support and attempted reconciliation of the Commission positions on jurisdiction.

[31]69 P.U.R.(n.s.) 85 (1947).

[32]70 P.U.R.(n.s.) 123 (1947).

[33]Interstate Co. is in fact a "natural gas company" under the Act, because of other activities and operations of that Company not connected with the local field sales involved in the *Interstate* case, to-wit, the transportation and sale of natural gas in interstate commerce for resale, through its interstate transmission pipeline system extending from its DeSiard Compressor Station in Monroe Field to and through a portion of the State of Mississippi to Baton Rouge, La. The jurisdiction asserted and here under consideration could not be predicated upon such other regulable and regulated activities and operations. Panhandle Eastern Pipe Line Co. v. Fed. Power Comm., 324 U.S. 635 (1945); Conn. L.&P. Co. v. Fed. Power Comm., 324 U.S. 515 (1945).

Interstate; "evidence also of affiliation [Note: with one purchasing pipeline company] and of the unusual position occupied in the Monroe field in Louisiana by a group of companies, including Interstate, who, together own 77% of the gas acreage of the field"; and that "Interstate purchases about half of its gas requirements from others in the Monroe field who make such sales to Interstate subsequent to the completion of gathering; so that, in effect, there is a second sale of the gas so purchased by Interstate." The Commission opinion and order in that case[34] was predicated solely on the concept of constant flow of commerce of the gas from the wells into the channels of interstate commerce. The fact that the local sales involved in the *Fin-Fer* and *Chicago* cases were "at arm's-length" was emphasized by the Commission in both cases (although it also appeared there was affiliation between Chicago, the seller, and Tennessee, the purchaser), as also was the asserted fact that neither company had "transmission facilities." Actually on the facts the Commission, as in the *Billings* case, could have found transmission between the termini of the gathering lines and the points of sale and delivery had it so chosen.

Then came the sweeping decision of the Supreme Court in the *Interstate* case. A vast and practically limitless area of jurisdiction, impossible of administration, thereby was imposed on the Commission. The variable and elastic jurisdiction which that agency theretofore had set up for itself was ignored and cast aside. The Commission found that the "constant flow" theory of jurisdiction announced by it in the *Interstate* case, was a rigid, not an elastic and pliable, test or standard.

Notwithstanding the decision of the Supreme Court, the Commission again undertook to define and declare its jurisdiction by the promulgation of "a rule designed to clarify the status of independent producers and gatherers of natural gas," which rule is said to be one of the "by-products of the Administrative Procedure Act" of 1946, "issued, in the exercise of administrative discretion, as an interim interpretation or declaration of policy consistent with the Commission's understanding of the Congressional intent that neither independent producers and gatherers nor the prices established at the well-head for their gas through arm's length bargaining should be subject to the jurisdiction of the Commission—all as previously found by the Commission in an early leading case."[35]

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[34] 3 F.P.C. 416, 48 P.U.R(n.s.) 267.

[35] Columbian Fuel Corp., 2 F.P.C. 200, 35 P.U.R(n.s.) 3 (1940); Nelson Lee. Smith, Chairman, Federal Power Comm., "Present-day Aspects of Rate Making," Public Utilities Fortnightly, Nov. 6, 1947.

The Commission in its opinion releasing the so-called interpretative rule in question[36] "gives its assurances to independent producers and gatherers of natural gas that they can sell at arm's-length and deliver such gas to interstate pipe lines . . . without apprehension that in so doing they may become subject to assertions of jurisdiction by the Commission . . ." The assurances are given in the face of both Commission and Supreme Court holdings that such sales are "the sale in interstate commerce of natural gas for resale." The rule is simply a redeclaration of the test of jurisdiction announced by the Commission in the *Columbian Fuel Corporation* case. This was the jurisdictional test which the Supreme Court in the *Interstate* case directly and expressly refused to approve and sponsor.

It should be evident that the Power Commission, whatever authority otherwise it may possess, has no authority whatever to give assurances of immunity from its regulatory jurisdiction to any persons, in derogation of the provisions of the Gas Act or contrary to the meaning attributed to that Act by the Supreme Court. Of course, the rule may mean what it states literally, that: "The Commission . . . will not assert jurisdiction over such producers and gatherers who might be subject to jurisdiction solely because of such sales." The Commission lawfully may not abdicate the authority delegated to it, even temporarily. The meaning of other words and phrases in the rule also are susceptible to some variety of construction. The principle of *caveat emptor* would seem to be applicable.

The producer or gatherer of natural gas who relies upon the Commission assurances nevertheless might find himself subject to the regulatory authority of the Commission, either through a Commission re-interpretation of Section 1(b) or because, as is the fact, the Supreme Court interpretation of Section 1(b) is much more authoritative. In such situation the so-called independent producer or gatherer might not then be free to discontinue his local field sales to the interstate pipeline, on the

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[36]Substantive Rules, General Policy and Interpretations, New Sec. 03.79, Aug. 15, 1947, Docket No. R-106: '*Jurisdictional Status of Independent Producers and Gathers. The Federal Power Commission is of the opinion that it was the intent of the Congress* that the control of production or gathering of natural gas should *remain a function of the States and that the Natural Gas Act should not provide for regulation of those subjects.*

"For the purpose of administering the Natural Gas Act, *The Commission will construe the exemption contained in Section 1(b),* to the effect that the provisions of the Act shall not apply to the 'production or gathering' of natural gas, as including arm's-length sales of natural gas by independent producers and gatherers, made during the course or upon completion of production and gathering. *The Commission,* consistent with this construction, *will not assert jurisdiction over such producers who might be subject to jurisdiction solely because of such sales.*" (Emphasis added.)

ground that he had official assurances that he was not "a natural gas company" and not subject to Commission jurisdiction, and that but for such assurances he would not have engaged in such local sales operations. If unhappily he finds himself subject to the Gas Act as "a natural gas company," he is a public utility, and thereafter is not permitted, under Section 7(b) of the Act, to abandon his facilities or discontinue the service rendered by him, "without the permission and approval of the Commission first had and obtained." Under such circumstances that permission and approval would be quite apt not to be forthcoming.

Briefly stated then, here is where we find ourselves:

1. The Gas Act, by express and explicit terms, sets in motion a limited and restricted federal regulation over certain enumerated operations and activities of those engaged in the natural gas industry. Such regulation covers the stated activities only in so far as actually and directly they are "in" interstate commerce. The jurisdictional provisions of the Act are unitary and do not differentiate between persons or between the same operations and activities when conducted by different persons.

2. By the cumulative announcements of the Supreme Court, it seems that all production, gathering and local sales of natural gas which thereafter enters the channels of interstate commerce, are subject to full and complete regulation by the Power Commission, notwithstanding the limitations and prohibitions of the Act.

3. The Power Commission undertakes to divide and dismember the integrated jurisdictional provisions of the Act. It asserts complete regulatory control over all producers, gatherers or vendors of gas who also are interstate pipeline companies. All the gas so produced and all the production properties and reserves of such companies are regulated by the Commission, whether or not all of such gas enters the interstate pipeline systems of such producers. The Commission, on the other hand, disclaims jurisdiction over all other producers, gatherers and vendors whose gas enters the channels of interstate commerce, if they are not interstate pipeline companies.

The result is confusion and conflict, which has been carefully nurtured and diligently developed through the years.

In this situation, the Power Commission continues actively to administer the Gas Act precisely in conformity with its own opinions, rules and edicts as to its jurisdiction.

THE COMMISSION "COST" OR "INVESTMENT" RATE-BASE AS APPLIED TO NATURAL GAS RESERVES AND THE PRODUCTION THEREFROM

In view of all the present confusion and unsolved jurisdictional problems, the natural inquiry immediately suggested is: Why not submit to rate regulation by the Power Commission? The answer to this question depends upon whether the producer, gatherer or owner of natural gas is willing to sell his gas on the formula of Commission-determined cost, designated by it as "the investment rate base," or only at the actual value thereof. The difference between the "cost" and "value" concepts is fundamental and far-reaching. Under the Commission "cost" or "investment" formula, the producer may receive virtually nothing for his gas over and above the mere expense of its production. The idea or fact of "value" has no place in that formula. It is disregarded and discarded.[37]

The Commission, under its own theories of jurisdiction, heretofore has not undertaken the regulation of other than interstate pipelines and presently gives assurances that it does not intend to do so. But whether the Commission views and conclusions can in some manner be declared to be consistent with its own flexible current of commerce test of jurisdiction, now broadly and rigidly imposed by the Supreme Court in the *Interstate* case, remains to be seen.

The Commission years ago committed itself to the proposition announced by it in several cases,[38] that Section 6(a) of the Gas Act authorizes and requires the Commission to adopt and use "actual legitimate cost" as the sole measure or formula of the rate base of all utility proper-

[37]See Cities Service Gas Co. v. Fed. Power Comm., 155 F.2d 694, 707 (C.C.A. 10th 1946). The Company was producer in the Texas Panhandle Field of much of the gas which entered its own interstate pipeline and was sold for resale in other states. The Commission allowed the Company a rate base of $1,776 (the expense of title papers) upon a single property consisting of more than 60,000 acres of the best gas lands in the field with reserve in excess of one billion Mcf., according to the Commission geologist. On this rate base the Company receives 6½% return (about $100 a year), plus actual expense of production, for the many millions of Mcf. of gas which annually are produced therefrom and enter the Company's interstate pipeline system.

In the *Canadian River Gas Co.* and other cases, the same Commission procedure is followed with similar confiscatory results. The Chairman of the Commission in a recent article entitled "Present-day Aspects of Rate Making," referred to earlier, undertook to justify this Commission procedure as follows: ". . . And, while the commission's method tends to eliminate or reduce the speculative profits of natural gas companies from gas production, at the same time its allowance, as operating expense, of the acquisition cost of leaseholds, the delay rentals thereon while they are held in reserve, well-drilling and exploratory costs, and all royalties and other expenditures incident to the operation of leases—items which might not be reflected in the going field price—tends likewise to minimize the element of risk in such operations."

This disarming language, when the mask of disguise is removed, describes exactly what took place in the cases above referred to.

[38]Chicago District Elec. Gen. Corp., 39 P.U.R.(n.s.) 263; Detroit v. Panhandle E.P.L. Co., 45 P.U.R(n.s.) 203; Cities Service Gas Co., 50 P.U.R.(n.s.) 65.

ties, including natural gas reserves and leaseholds. Accordingly, it has held that evidence of "value" is immaterial and must be excluded. And it has continued to insist on such construction of Section 6(a) of the Act despite repeated declarations af the Supreme Court that the Commission is not bound to the use of any single rate base formula or combination of formulas in determining "just and reasonable" rates and that under the Act the result and not the method employed is controlling.[39] The Commission construction of Section 6(a) does not find support in the provisions of the Act or in the historical development of the structure thereof.[40] As originally proposed by the Commission, that body was required to "fix such rate as will allow a fair return upon the actual legitimate prudent cost" of the utility property. This mandate and other similar provisions[41] were stricken in their entirety from the Power Act as enacted in 1935, and the provisions of the Power Act so enacted were incorporated as Section 6(a) of the Gas Act, as enacted in 1938. Yet the Commission, by defining its own powers, has accomplished its purposes just as fully and completely as had its proposal been incorporated in the two statutes, instead of stricken therefrom.

The determination of the Commission to discard "value" and to impose "cost" as the measure of rate base of all utility properties, whether constructed facilities or gas reserves and leaseholds, in my judgment, is and has been the principle objective served by the several successive steps in the administrative and judicial enlargement of the statutory jurisdiction delegated by the Congress to the Commission.

As a practical matter, this question of price is the heart of the entire problem. The Commission having "rejected the fair value standard" and claiming, as it now does, that there is "general acceptance of net investment, or cost, as the primary measure of the rate base," even with respect to non-constructed plants and property such as gas reserves and estates, the possibility is exceedingly remote that it voluntarily would or could recede from that position. This would be true even if, contrary to its present assurances, it should be obliged to exert regulatory authority over others than interstate pipelines as a final result of the *Interstate* case. The Commission, of course, recognizes the legal and actual absurdity of its

[39]Fed. Pow. Comm. v. Natural Gas. P. Co., 315 U.S. 575 (1942); Hope Natural Gas Co. v. Fed. Pow. Comm., 320 U.S. 591 (1944).

[40]As enacted, Section 6(a), which is identical with and taken from Section 208 of the Federal Power Act, is as follows: "The Commission may investigate and ascertain the actual legitimate cost of the property of every natural-gas company, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation and the fair value of such property."

[41]H.R. 5423, 74th Cong., 1st Sess., Feb. 6, 1935, Title II, Sec. 211, Title III, Sec. 312.

dual formula for pricing gas, determined by who produces that gas,[42] but thus far has shown no real disposition to remedy that "fantastic method of fixing a 'just and reasonable' price for gas."[43]

It is altogether probable that most producers, gatherers and vendors of gas will elect not to take the risk of subjecting themselves to the consequences of regulation by the Power Commission.

It is evident too that the jurisdictional confusion and uncertainty which has been developing through the years and has been brought to focus by the *Interstate* decision, cannot be resolved either by administrative fiat or judicial order. Actually each successive pronouncement by Commission and Court alike has served merely to make the problem more complex and the possible solution thereof more remote. The actual terms and provisions of the Gas Act no longer are considered as each decision ventures further and further in the realm of assumed but undisclosed and unexpressed Congressional intent.

Amendment of the Gas Act

The only possible answer must be found through the re-declaration by Congress of the jurisdictional grants and prohibitions found in Section 1(b) of the Act,[44] in direct and commanding terms of sufficient power to discourage further and continued encroachment upon the legislative function. There are several amendatory bills now pending before the Congress, of which the Rizley Bill, sponsored by the oil and natural gas industries[45] and a bill drafted and sponsored by the Power Commission[46] briefly should be mentioned. The Rizley Bill undertakes to re-assert and re-state in great detail the jurisdictional provisions of the Act. The Commission bill re-asserts and re-states the decision of the Commission in the *Columbian Fuel Corporation* case, *supra.* The Commission, and evidently the Administration, are against the Rizley Bill. Much feeling has been developed between spokesmen for both the Commission and the industry. Perhaps, after calm consideration and by redrafts of both bills, the problem of jurisdiction and a sound and fair method of pricing gas by the Commission can be worked out and agreed upon. This is the hope upon which we must rely, and which must be translated into reality.

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[42]The legal, logical and economic fallacy of such Commission procedure was discussed by Mr. Justice Jackson in *Hope Natural Gas Co. v. Federal Power Comm., supra,* but he was unwilling to do anything about it when the opportunity effectively so to do was presented to him in *Canadian River Gas Co. v. Fed. Pow. Comm., supra.*

[43]Address, Chairman Smith, Federal Power Commission, *supra* note 35.

[44]See dissenting opinion Commissioner Draper to opinion and rule of Commission, August 7, 1947, *supra* note 6, guaranteeing to certain producers and gatherers of natural gas immunity from the assertion by it of jurisdiction over them.

[45]H.R. 4051, 80th Cong., 1st Sess.

[46]H.R. 4099, 80th Cong., 1st Sess.

PROXIMATE CAUSES AND EFFECTS

"A plague on both your houses."

*W. W. Venable**

Introduction

I am advocating in this article that we lawyers cease the use of the phrases "proximate causes" and "proximate effects" in our arguments, briefs and opinions. They have come to mean, if anything, simply that regardless of the grounds for liability or non-liability, and frequently where no question of causation is involved, the court has decided to hold the defendant liable or not liable as the case may be. Yet, because of the language of precedents, we feel compelled to reduce all tort cases, particularly negligence cases, to a common denominator of causation even when no question of causation is involved.

Permit me to say initially that there is nothing original in this paper. For a good many years, in the study of the cases, I have ignored the language of the decisions as far as the "proximate cause" and "proximate effect" verbiage is concerned and have tried to look beneath the terms to find the real grounds for decision. I have found that approaching the problems from the viewpoint of the elements of the cause of action, as advocated in this article, is of great assistance. I have received aid in the clarification of my ideas from various cases on the law of torts and dissenting opinions which point out that no cause problem was involved in the case decided. I am particularly indebted to Professor Green's *Rationale of Proximate Cause,* which clarified in my mind what I had more or less dimly perceived and endeavored to apply. I have also received aid from the writings of Professor Bohlen, Dean Wigmore, and others, judges and teachers.

My hope is that the approach here suggested will be of some assistance to the members of the Bar in the evaluation of our cases and their analysis, and perhaps, cause us to confine our arguments to the real issues presented by the facts in any case, dealing with them separately, and without citing innumerable cases on proximate cause which may have no bearing because of the difference in facts and issues presented.

If in my remarks I appear to be somewhat irreverent and disrespectful, I beg to say it is not directed, as such, to the ability or character of the eminent, learned and able men of our profession, who are the judges.

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In seeking to reduce every negligent act to one of causation, they but follow precedent as do we at the Bar.

The term "proximate cause" has simply come to mean a cause for which the law will impose liability. Such adopted meaning solves no problems, has a tendency to obscure the real ground of liability or non-liability and, frequently, to draw the mind away from the consideration of the problems presented by the facts.

The phrase as used simply combines two unrelated things: causation, which is always a question of pure fact; and legal liability, which is always an act of the law which imposes liability or relieves from it as it sees fit. Whether the act or failure to act of a defendant was a substantial factor in producing a given result is necessarily a question of fact and is the only question involved in any problem of causation. Assuming that the defendant did cause the result, the question of whether or not liability shall be imposed involves numerous considerations.

To combine in one phrase these two unrelated things and then attempt to use the hybrid as a solvent of legal problems makes for confusion of thought.

We think in words, and fuzzy words produce fuzzy thoughts. How did we get this way?

Many years ago, Lord Bacon wrote, "In lege, proxima non remota causa spectatur." A sad day!

Scholars tell us that he was pointing out that in law the act or failure to act was looked to and that the law did not concern itself with the metaphysical reasons for the act, if any. If John Doe negligently fired a gun and wounded Richard Roe, the law would not go into an inquiry as to whether the addiction of John Doe's great-grandfather for fermented prune juice would produce a tendency to negligence in his great grandson. John Doe had to measure up to the degree of care of the standard man and the law looked upon any metaphysical excuse as immaterial. A theoretical argument, or even a conclusive demonstration, that a man is descended from monkeys will not be listened to as excusing his monkeyshines.

It appears that this verbal fog-bomb lay quiescent for about two hundred years while lawyers and courts argued and decided tort cases with no feeling of deprivation due to the absence of the maxim from their thinking. After these quiet years some lawyer or judge discovered it, pulled the firing pin, and we have been in something of a fog ever since.

Taken literally the maxim states that the cause of a given effect is the one that is nearest to it in the chain of causation. It did not take the courts long to decide that this was not true, that neither nearness in time, space nor place in causative chain is decisive. We thus have repudiated the maxim that we constantly quote and look upon as a formula for the decision of cases, for which purpose it is about as useful as the nursery rhyme of "Eenie, meenie, mynie, mo, . . ."

As used by us, these fuzzy words have given birth, in an effort to explain them, to a progeny as confusing as their parent.

I think we will agree that as understood by the average layman, and also in law, a cause, or one of the causes of an effect, is an act or failure to act that is an appreciable or substantial factor in producing it. It is so defined in our decisions and the *Restatement*.[1]

Taking the definition as true, certain expressions that we use are as vague and meaningless as the maxim they are used to elucidate and apply. To think with any degree of clearness, if we use these expressions, we find ourselves in constant need of explaining the explanation. Mentally we become verbal puppies chasing verbal tails, with consequent dizziness.

We are told that to be a "proximate" cause, it must be a *causa causans* and not simply a *causa sine qua non*. All this sounds very learned and wonderful in Latin, but in fact it is simply announcing that a cause must do some causing in order to be such; that a cause must be a cause, a material factor in producing a given effect or result, is all that it says. How a cause could be other than causing is beyond comprehension. And how a cause without which the effect would not have been produced could be other than a substantial factor in bringing it about and hence a *causa causans*, or just plain cause, does not appear. In the realm of reality and defining cause as a substantial factor in producing a result, every such is at the same time a *causa causans* and a *causa sine qua non*. Innumerable factors enter into causing any given effect. The act or failure to act of a defendant is but one of them. The basic question is whether he is to be held responsible for the result of all the factors or causes because of the contribution to the result that his action has made. This is a question of legal liability and not one of causation.

It does not advance thinking to deny, contrary to truth, that these other substantial factors are causes. In no situation is a defendant held

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[1]N.O & N.E.R.R Co. v. Burge, 191 Miss. 303, 2 So.2d 825 (1941); RESTATEMENT, TORTS § 431.

liable or non-liable on the ground that they are not such, if we consider substance and forget the language used.

We argue and the courts write in their opinions that a certain state of things is not a cause but a condition.

Taking the definition of a cause as true, any condition of things that is a substantial factor in producing a given result is one of the causes of it. We can't remove its causative effect, a fact, by calling it names. It is still a cause, though we seek to remove it or declare its immateriality relative to defendant's liability by calling it a condition.

We argue to the courts and read in their opinions that a negligent act which was a substantial factor in fact in producing a given harmful result has ceased to be a cause, because it has become insulated by the negligence of a third person.

A superseding cause is defined as the act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about.[2]

We argue in our briefs and the courts write in their opinions that the negligence of defendant is not the proximate cause of the harm because of the intervening negligence of the third person.

Of course, the negligent act of the defendant, a substantial factor in producing the harm, cannot be insulated as a cause because we cannot insulate a fact. Yet this is what we say takes place. What actually takes place is insulation from legal liability, a totally different matter. The law imposes or relieves from liability according to its wisdom, but the law cannot insulate or evaporate facts.

We strongly state in our briefs and courts declare in their opinions that in order to be a proximate cause it must be an "efficient cause." How any cause, a substantial factor in producing a result, could be other than efficient is nowhere explained. Yet the statement implies that there are factors in producing a given effect that are efficient and others that are not. How some substantial factors are held efficient and others not, when all contribute to the result, is nowhere explained. What is the judicial test? According to the definition of cause, when a factor or what is claimed to be a factor is inefficient, it is simply not a cause.

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[2]RESTATEMENT, TORTS § 440.

Finally we surrender completely and with the full agreement of the Bar, we announce that it is impossible to give a definition of proximate cause, but that the definition varies with the varying facts of each type of case.[3]

If we had a measure that changed its length with each change of environment, we would get another measure or stabilize its length in some way. Aaron's rod was fine to scare Pharoah with once, but if it developed the habit of changing back and forth from snake to staff with each change of circumstance it would have proven a poor staff and an equally unsatisfactory snake.

We sometimes have cases sent to the jury to decide whether an act or failure to act is a proximate cause. An intelligent juror asks the court to tell him how he is to identify a proximate cause, to give him a definition or description. The court is forced to reply: "Gentlemen, I cannot do it, it is something that has neither definition nor description. You must proceed in vacuo. Retire to your room and make up your verdict and may God have mercy on our souls."

Such a situation appears to be highly irrational. If I collected a group of boys and told them that I wanted them to go to the woods and catch me a "Squedunk," they would no doubt ask me how they were to recognize a "Squedunk." Suppose I replied: "Boys, I can't tell you how it looks. It changes its appearance with every change of environment. In a pecan grove it might look like a squirrel; in alfalfa like a rabbit; in the cane brake like a fox; around a house like a dog; in tall grass like a chigger and then again like a cattle tick. All that I can tell you is that no one can describe it." The boys would look at one another. Out of politeness they might retire out of sight towards the woods. They would then gather in a group and one would say, "He's as nutty as a fruit cake, let's go home." Another might reply, "The Old Coot doesn't know himself what a 'Squedunk' looks like, so let's catch something and take it to him." This is what a jury frequently does with finding proximate cause; no blame to them under the circumstances. The supreme court, not being satisfied with the result and deciding that the boys have brought in a real rabbit instead of a "Squedunk," it though appearing vexed, not looking "metaphysical," having the animal on hand and under the necessity of getting rid of it, announces that it is a rabbit and not a "Squedunk," as a matter of law, or, to change the

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[3]Cumberland Tel. & Tel. Co. v. Woodham, 99 Miss. 318, 54 So. 890 (1911); Magers v. O.H. & C.C.R.R. Co., 174 Miss. 860, 165 So. 416 (1936).

figure, gets rid of the alleged cause "Squedunk" by calling it a condition and not a cause, or they insulate it.

It is small wonder that worn out with trying to think in such language we seek to account for the mental fog and explain what we cannot explain, as do savages, by an appeal to the assumptive and supernatural, and announce that what is a proximate cause is a "vexed metaphysical" question.[4]

The humor of the situation is that it is highly probable that Lord Bacon wrote his maxim to combat the idea that metaphysical elements had anything to do with it.[5]

I do not believe that it is necessary to speak of it, or think of it as a metaphysical question. It seems to me that it has become such in our thinking because we have attempted, most frequently in negligence cases, to reduce all elements to terms of causation. Certainly for a defendant to be liable he must have caused the damage, but he may be non-liable though it is undoubted that he did so cause the damage. There are other grounds of non-liability totally disconnected from causation. This effort to reduce all cases to the common denominator of causation and in our terms mating causation with legal liability, thus producing an unnatural child, proximate cause, has produced the sterility that is nature's protest against man's attempt to create a new genus, *vide,* a mule.

I trust that this citation will not be applied too broadly. I am not implying that we lawyers who fathered proximate cause are to be placed in the same category with the father of mules.

Is There Another and Clearer Method?

I believe there is another and clearer method and one in which the word "proximate" does not have to be used either as to causation or consequences.

I suggest an approach based upon the essential elements of a cause of action in tort.

(1) There must be a rule of law, whose purpose it is to protect the interest involved from the risks or chance of harm encountered.

(2) The defendant must have violated the rule.

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[4]Pietri v. L. & N. Ry. Co., 152 Miss. 185, 119 So. 164 (1928); Billingsly v. I.C.R.R. Co., 100 Miss. 612, 56 So. 790 (1911).

[5]Selected Essays on Law of Torts, pp. 731, 732.

(3) The violation must be a substantial or appreciable factor in producing the harmful results.

(4) The damage to the protected interests must be evaluated in terms of money.[6]

The purpose of general law is the protection of certain human interests and the adjustment of them each to the other in our human society, a constant and never ending process, worked out by decisions of our courts through the judges as spokesmen of the law.

Human beings have certain interests, objects of their desires, for which they demand and in a measure receive protection by the law. There is the interest of immunity from physical harm, the sensory interest of freedom from pain, the mental interest in freedom from mental and emotional disturbances, the interest in the right to move from place to place at will, the interest in the control and enjoyment of tangible property, the interests in certain relationships to others, such as that between husband and wife, parent and child, guardian and ward, and interests in certain relationships, profitable in character, with the members of the community in general. These might be called profitable society relations. Other interests might be mentioned.

Human interests are frequently competing . Full protection to one type of interest might completely stop all human progress in some directions. For example, it was once said that the owner of land owned the space over his land up to high heaven. If so, no airplanes could fly without their operators being guilty of trespass. The courts changed this rule, a wise and necessary adjustment.

No human interest is protected fully. They are protected only to the extent that it is deemed socially desirable. There are some risks of harm that we must bear as members of a living and, therefore, ever changing society.

As conditions change, the relative protection of interests must undergo constant change to attain that which is socially desirable. The making of these adjustments is probably the most important work of the courts, calling for the highest order of legislative statesmanship, a function the exercise of which has enabled the common law courts to mold the law to suit changing conditions.

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[6]For the application of these elements, substantially considered, to the action of negligence, *see* RESTATEMENT, TORTS, § 281.

In its last analysis, whether an interest shall be protected from a given risk, or protected at all, is based upon what is considered sound public policy.

Lack of protection or exemption from legal liability, which is the same thing under another name, may be based upon the plaintiff's own aggression, his consent to suffer the harm or encounter the risk, his being a law breaker, his contributory fault, or the necessity that his interests be sacrificed for the general good in certain cases, as in fighting fires, war or plague. It may be based upon policies of encouraging economic improvements for the general good of society, the necessity of free social rivalries in pursuit of a livelihood, the necessity in a democratic country for free discussion and criticism of character and conduct, the preservation of freedom of resort to the courts for the vindication of rights or protection of protected interests, the necessity of preserving the independence of officers administering justice and of public officers in general. Doubtless there are or will be others.

The point here to be emphasized is that whether the law affords protection or denies it with respect to any given risk is purely a question of law based upon what is considered sound public policy. Since protection to our interests comes from the law, we must appeal to the law to show that we are entitled to the protection claimed. So a basic element in any cause of action is a rule of law the purpose of which is to afford protection to the given interest from the risk encountered.[7]

From the nature of the case, lawyers in their offices, the trial judge and the judges on appeal must consciously or otherwise decide the scope of the protection furnished by any rule of law invoked in any particular case, to determine whether the interest claimed to have been invaded comes within the circumference of its protection. If an interest does not,

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[7]The following interests have been held to be unprotected: mental suffering caused by negligence when disconnected from physical impact, Doherty v. Mississippi Power Co., 178 Miss. 204, 173 So. 287 (1937); mental suffering of deceased from fright at impending death, where death is instantaneous or injured man is unconscious until death, Y.&M.V.R.R. Co. v. Lee, 148 Miss. 809, 114 So. 866 (1927); where death is instantaneous, Y.&M.V.R.R. Co. v. Barringer, 138 Miss. 296, 103 So. 86 (1925); the interest of deceased in his own life, Kirkpatrick v. Ferguson-Palmer Co., 116 Miss. 874, 77 So. 803 (1918); the interest of trespassers against the risk of simple negligence, Byars v. Davis, 131 Miss. 1, 94 So. 853 (1923); the interests of mere licensees or invitees, Allen v. Y.&M.V. Railroad Co., 111 Miss. 267, 71 So. 386 (1916); neither husband nor wife is protected against negligent injury caused by the act of the other, Austin v. Austin, 136 Miss. 61, 100 So. 591 (1924); McLaurin v. McLaurin Furniture Co., 166 Miss. 180,, 146 So. 877 (1933); wife's interest in consortium where husband is negligently injured, Nash v. M.&O.R.R. Co., 149 Miss. 823, 116 So. 100 (1928); interests of lessee against risk caused by premises being in disrepair, Rich v. Swalm, 161 Miss. 505, 137 So. 325 (1931); otherwise where there is contract to repair, Hodges v. Hilton, 173 Miss. 343, 161 So. 686 (1935).

this is an end to the matter. To state this result in terms of causation or even to argue and consider it in such terms has a tendency to obscure the issue, which broadly speaking is the problem of determining what is socially desirable. This process involves a consideration of numerous elements—social, economic, ethical, the customs of the people, the comparative social utility of the act sought to be prohibited, practical administration of the rule and numerous others.[8]

This is and must always be a question of law and for decision by the judges. It cannot be a question for a jury, which has no power either to make or to announce law.

If this be a sound principle, then it is often violated. Under the guise of having a jury pass on whether the act of a defendant was the proximate cause of an injury we submit to the jury the task of announcing a rule of law, namely whether or not the interest is protected against the risk encountered. If the jury decides this question and it is not satisfactory to the appellate court, we find the court using various devices to get rid of the finding.

It is apparent that determining whether a rule protects against a given risk is a different process from that of determining cause and effect. One is a pure question of law, the other is a pure question of fact. By undertaking to solve the problem of whether a rule should protect against a certain loss, courts, with all due deference, by treating as a cause problem that which is a question of fact, have frequently submitted a legal question to the decision of a jury.

The appellate courts reverse the finding of the jury, because, upon their study of the case, they do not feel that the rule of law affords protection, but they state the result of their findings in terms of proximate causation and hence appear to have revised the verdict of the jury and to deny to the jury their right to decide a fact about which reasonable minds might differ.

The next question is whether or not the defendant has violated the rule, assuming that the rule affords protection. If it has not been violated no one is in a position to be held liable because no one has violated the command of the law and liability springs from failure to do that which the law commands. Whether there has been a violation or not is a question of pure fact. Of course, in negligence cases it is said to be a mixed question of law and fact in the sense that the defendant in his conduct must conform to the standard of the reasonably prudent man, who, judg-

[8]Restatement, Torts, §§ 291-293.

ing by verdicts, is frequently neither reasonable nor prudent and will act one way in Alabama, another way in Mississippi, and a third way in Kentucky under the same circumstances. Having decided what the reasonable, prudent man would have done under the circumstances, the jury then decides whether or not the defendant has conformed to this standard. But, when all is said and done, the jury decides two fact questions: first, what the reasonably prudent man would have done; and second, whether or not the defendant acted according to this standard.

I admit the indispensability of the reasonably prudent man as a standard. We have him and cannot get rid of him. Like a transverse colon he gives frequent trouble, but is indispensable.

The next element is inquiry as to whether or not the violation caused the damage. We may have a rule of law and we may have its violation and yet the violation may or may not have invaded a protected interest of a claimant. Tort law is concerned with the protection of human interests for the benefit of the person. If the interest has not been invaded, there is no cause of action for reimbursement because there is no loss to be reimbursed.

The test of causation is whether or not the act of the defendant was an appreciable factor in producing the harmful results. This is necessarily a question of pure fact. No question of law is involved. Where then is there any necessity for the use of the adjective "proximate" as a modifier of the word "cause"? Why not simply ask the question and answer it? Did the acts of the defendant cause, that is, were they a substantial factor in producing the injury to the protected interest? To answer this question there must be a comparison and appraisal of the contribution made by the defendant to the final result with other factors aiding in producing it. It may be answered by the court, or by the jury if reasonable men might differ.

A study of the cases will disclose the circumstances in view of which, under the guise of determining proximate cause, the courts have held a defendant's contribution to the harmful result substantial or not. Space will not permit a review of such cases here.

The question, however, to be submitted to the jury is not whether the act of the defendant was a proximate cause of the injury, but whether or not the act of the defendant was a substantial factor in producing it. If we are correct in this statement, there is no need for the use of the word "proximate" or "proximate cause," which the courts tell us are impossible to define.

Tests for Proximate Cause

I will use negligence cases for the reason that the expressions proximate cause and proximate effects appear most frequently in them.

The following definitions or tests have been given.

> An injury that is a natural and probable consequence of an act of negligible is actionable, and such an act is the proximate cause of the injury. But an act which could not have been foreseen or reasonably anticipated as a probable result of an act of negligence is not actionable, and such an act is either the remote cause or no cause whatsoever of the injury.[9]

Again,

> When an act or omission is negligent, it is not necessary in order to render it the proximate cause, that the actor could or should have foreseen the particular consequences . . . If by the exercise of reasonable care he might have foreseen or anticipated that some injury might happen.[10]

Again,

> Without attempting to define proximate cause as will be applicable to all sets of fact, for to do so is practically impossible, it will be sufficient to show that the negligent act of a person resulting in injury is the proximate cause thereof, and creates liability therefor, when the act is of such character that by the usual course of events some injury, not necessarily the particular injury or injuries received in the particular manner complained of, would result therefrom, provided the attendant circumstances are such that an ordinarily prudent man ought reasonably to anticipate that some injury would probably result from the act done.[10½]

In these statements, it will be noticed that causation is combined with negligence in order to constitute proximate cause.

Again,

> When the conduct of the actor is negligent and he could or should have foreseen that some harm would come to another as a result, then the two following statements of established principle come into play.

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[9]Victor Sparkler & Specialty Co. v. Price, 146 Miss. 192, 111 So. 437 (1927).
[10]Tri-State Transit Co. v. Martin, 181 Miss. 388, 179 So. 349 (1938).
[10½]Cumberland Tel. & Tel. Co. v. Woodham, 99 Miss. 318, 54 So. 890 (1911).

> "If the actor's conduct is a substantial factor in bringing about harm to another, the fact that the actor neither foresaw nor should have foreseen the extent of the harm or the manner in which it occurred, does not prevent him from being liable.[11] . . ."

Again the court said:

> The area within which liability is imposed in that which is within the circle of reasonable foreseeabiilty, using the original point at which the negligent act was committed or became operative, and thence looking in every direction as the semidiameter of the circle, and those injuries which come from this point could or should have been reasonably foreseen as something likely to happen, are within the field of liability, while those which although foreseeable were foreseeable only as remote possibilities, those only slightly probable, are beyond and not within the circle . . . in all of which time, place and circumstances play their respective and important parts.[12]

It will be noticed from these statements that the idea of proximate cause is composed of two elements: a negligent act and actual causation. In the analysis offered, it is sought to get rid of the confusion which comes from combining these two unrelated things in one phrase by separating actual causation from negligence, which consists of the violation of the rule of due care. In actual decision probably the same result would be reached, but the separate and distinct elements would be kept apart and thus being separately defined would be better considered and argued.

The formulas which we have quoted are often used in connection with the so-called question of determining whether or not the harmful effects produced were the proximate consequences, as it is said, of the negligence of the defendant.

Proximate Consequences

Any limitation placed upon liability for the consequences negligently caused by an act or failure to act must necessarily be an act of the law and, therefore, must necessarily be because the law does not protect the injured interest from the particular risk. The argument would be that even though harm is actually caused by the negligence, the law in its wisdom does not or should not impose liability. We think the difficulty with the situation and mental confusion in attempting to apply the

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[11]Tri-State Transit Co. v. Martin, 181 Miss. 388, 179 So. 349 (1938).
[12]Mauney v. Gulf Refining Co., 193 Miss. 421, 9 So.2d 780 (1942).

formula to particular cases comes from the use of the words "proximate and remote" consequences.

The purpose of the rule is to protect a particular interest. If the defendant perceives that his conduct will endanger the interests so protected, he is guilty of negligence and as announced by our court, it is immaterial that he did not foresee the particular type of harm that would be done to the interest or the manner in which it would be done. It is sufficient for liability that he saw or should have seen danger to the interest. If this be true, non-liability for a consequence negligently caused by the act of the defendant must be based upon the fact that the interest so injured is not within the protection of the rule invoked.

It is submitted that all cases of so called remote consequences fall into this category. If an interest is not within the scope of protection of the rule, the defendant is not liable for any injury to it, even though he be negligent as to other injured interests. As to the so-called remote interest damaged, he has not violated the command of the law. The rule of due care is that care is to be taken not to put in danger of harm any interest that a reasonable, prudent person should or would perceive to be endangered by the proposed act.

When we take up the problem as to whether a defendant shall be liable for a consequence that his negligence has caused, we say in the quotation above that if he saw or should have foreseen danger to a particular interest this is all that is necessary to impose liability. Yet, when we come to consider what we call consequences instead of asking ourselves whether or not he saw danger to the interest invaded, the manner of the harm being of no importance, we make a problem for ourselves and engage in this kind of reasoning in our effort to reduce the question of liability to a question of causation. We take the items of damage and ask ourselves whether they were proximate consequences. We do not seem to be conscious of the fact that when we assume that they are consequences we have already admitted that they were caused by the negligence of the defendant. We ask if the harm or result is proximate or remote. We have decided that it is a consequence or result of the act of the defendant, which, if so, makes the act of the defendant a cause and then having assumed that the act of the defendant was a cause, we use the proximate and remote formula to determine whether the damage was a consequence, which we assumed in the beginning.

A simplication of the process: we take the idea of the formula and then set about trying to determine the two separate and distinct

things. First, was his act the cause of the damage, which is already assumed when we speak of consequences, for otherwise the question of remoteness would not arise, and second, whether the defendant should be held liable. To decide the question of liability, we should ask the question whether the consequence is or represents a damage to an interest protected by the rule of due care, from the particular risk encountered. The point is that no question of causation arises and no question of causation is involved, but we make a question of causation out of it. Taking the words we use, we substitute the cause issue for the defining of the scope of protection afforded by the rule, which is the only one really involved.

In one Mississippi case, a telegram was sent a shipper of potatoes by a railroad company, stating falsely that the potatoes were unclaimed. A trip by the shipper to New Orleans made it impossible for him to countermand orders for the loading of other cars, which because of a slump in the market were sold at a loss. The court held that such loss was too remote to be recoverable for mere negligence in sending the telegram.[13]

The court held that "the loss on the last two cars was not efficiently or proximately caused by the telegram," but that this damage was remote, though this word was not used. According to the analysis here presented, the loss on the two cars which were loaded and thrown on a lowered market was not recoverable because the rule of due care did not cover this risk, or if it should be held that it did cover the risk, the sender of the telegram did not violate the rule and was guilty of no negligence with respect to this interest. A reasonable and prudent man would not have foreseen that sending a false telegram would have imperiled the interest of the chance to refrain from selling on a falling market.

In another case a druggist, contrary to a statute making it a misdemeanor so to do, sold chloroform to a minor of an age of discretion and who clerked in a store. The minor while drunk drank the chloroform and died from its effects. The court held that the violation of the statute was not the proximate cause of the injury.[14]

The statute prohibited the sale of poisons to minors with no reference to age of discretion. The obvious purpose of the statute was the protection of minors from being injured or killed by poison placed in

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[13]N.O.&N.E.R.R. Co. v. Matthews, 131 Miss. 68, 95 So. 133 (1923).
[14]Meyer v. King, 72 Miss. 1, 16 So. 245 (1894).

their hands by druggists, either by gift or sale. The first question was whether or not the rule of law was intended to protect all minors, whether having discretion or not. If this construction should be placed upon the statute, liability would follow, since it was undoubted that the defendant violated the rule and the violation was a substantial factor in producing the injury as correctly admitted by the court when it conceded that had the minor not had discretion, defendant would have been liable.

The court arrived at its conclusion in a somewhat curious way from the view-point of the process of analysis here advocated.

The court held that the druggist violated the statute, that this was negligence *per se* and held that the declaration was defective in not setting forth facts showing that there was anything in the character or disposition of the minor that rendered it dangerous to put chloroform in his hands. It quoted with approval from a case holding that the declaration should show that the injury ought to have been anticipated as probable. The court made the governing rule that of due care. It held that the declaration did not show a violation, because it did not show that the druggist had been guilty of lack of it, since no reasons were stated for anticipation of probable injury. The governing rule was the command of the statute. If the druggist did that which the statute prohibited and thus produced an injury to a minor that the statute was intended to protect against there would be liability whether a reasonable, prudent man would have anticipated danger or not. It is not a negligence case. It is true that if a druggist sold poison to a minor or to an adult with reason to believe that he might take it and be injured, an action of negligence would lie and the rule of due care would be invoked. Whether the rule was violated or not by the defendant, whether he was negligent or not would be pertinent, but in this case the foundation of the suit was the statute.

The court also held that the minor was guilty of contributory negligence, then a complete defense. This also is a question of the scope of the protection afforded by the statute. Was the statute intended to protect the interests of a minor guilty of contributory negligence? Construing the statute as not intending to protect the interests of minors of discretion guilty of contributory negligence, we reach the same conclusion as did the court. There was no cause problem in the case though decided in terms of proximate cause. Looking at the case from the view-point of results, the court held the results not to be proximate.

Our court in effect decided that a minor of the age of discretion was not protected by the statute, but decided it in terms of causation.

Where, contrary to ordinance, parents permitted a twelve year old child to drive an automobile and there was injury to a pedestrian and both the parents and the child were sued for negligent injury, the negligence of the parents being the violation of the ordinance, the court held that if there was liability on the part of the parents, their violation of the ordinance had to be the proximate cause or one of the proximate causes of the injury, and to be such the child had to be negligent in the driving of the car.[15]

Insofar as the parents were concerned they had violated the rule of the statute. There were two possible questions in the case. First, whether or not the statute was intended to protect against the risk of a non-negligent minor injuring a pedestrian or only against injuries by a negligent minor. The court in effect announced that the rule did not protect against the risk of injury by a minor driver unless the minor was negligent. The other possible question was whether or not the violation of the statute was a substantial factor in producing the injury, even though the minor was negligent. The court in effect held that it was by holding that the parents would be liable if the minor negligently caused the injury. Finding the scope of the rule was for the court. The court also held, as a matter of law, that the violation of the statute was a substantial factor in producing the harmful result. Therefore, there was only one issue in the case and that was whether or not the minor was negligent, but the court in its language, following traditional phrasing, stated the question in terms of causation, namely, was the violation of the statute the proximate cause of the injury. There was no cause problem in the case.

Again, when half a carload of staves awaiting shipment along a right-of-way was negligently burned by a railroad, it was held by the court that the owner could not recover for the loss of sale of the half not burned. The Court held that this loss was too remote and that the only damage which could be recovered was for the staves that were actually burned.[16]

The rule of due care to so operate its railroad as not to negligently destroy property placed on its right-of-way for shipment is clear. The railroad company violated the rule by being negligent and burned half of the staves. The other half was not injured. The rule invoked protected the interest of the plaintiff in the burned staves. The only question was whether or not it protected the interest of the plaintiff in selling the uninjured staves. Half of the staves were uninjured, the injury to the other

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[15]Somerville v. Keeler, 165 Miss. 244, 145 So. 721 (1933).
[16]Y.&M.V.R.R. Co. v. Cox, 114 Miss. 49, 74 So. 779 (1917).

half was that they were rendered unsalable, according to the plaintiff. The court in effect held that this interest was not protected. There was no need for the use of the terms "remote" or "proximate" consequences.

The process of determining whether a consequence is remote or proximate, to use the language of the cases, is simply answering the inquiry whether the interest is protected by the rule invoked as against the particular risk encountered. There is no need for the use of the words "proximate" or "remote."

If the interest is protected from the particular risk and has been invaded, there is liability and the process of determining the damage is simply one of translating the damage into a measurement of money.

Intervening and Superseding Causes

Whether several tort feasors shall be jointly or severally liable offers no problem of causation. Where two persons contribute to the same injury, whether they are to be held jointly for all of the damage done, whether one is to be held and the other exonerated, or whether each shall be held only for what is considered the amount contributed to the injury is purely a question of law and of public policy.

Where plaintiff seeks to recover against one or more persons for an injury, the only cause problem is what part was played by each or all in producing the harmful results. When this is determined, a pure fact question, it is for the law to say whether the contribution made by either is sufficient to make them responsible in damages. In every case there are numerous cause factors. The plaintiff chooses one that is the act of the defendant or defendants and seeks to recover on the basis of the contribution of his act to the harmful result. Intervening agencies or forces joining with the act of the defendant in producing a given result have little bearing on the problem of causal relations. They are important as to legal liability, but the part played by them in producing the result is simply a fact question. When the court announces that a certain act or intervening event was or was not a superseding cause it simply is announcing that the fact of the existence of this intervening force does or does not relieve from legal liability.

The decision of this question, since it is a law question, necessarily comes under the first element of the cause of action, namely, was the intervening force one of the risks protected against by the rule invoked. If it is protected against it cannot have the effect of relieving the defendant from liability for his violation of the rule. If it is not protected against by the rule invoked, another question may arise. This is whether in

view of the part played by intervening forces, the act of the defendant was a substantial factor in producing the harmful result. It does not help the situation to discuss the problem in terms of causation as is almost always done.

An oil company negligently permitted a storage tank to overflow. The act of a third person, who turned off the electric switch of the storage pump and thereby produced a spark which caused the oil to ignite, resulting in the death of another person, was held not to supersede the negligence of the oil company as the proximate cause of the injury.[17]

The court, using the language of causation, says that the intervening force which combines with the negligence of another in producing injury to a third person does not necessarily supersede the original act of negligence in producing injury to the third person and become the sole proximate cause of harm produced thereby. It does not become such a cause if it is the normal response to a situation created by the negligence of another and the manner in which it is done is not extraordinarily negligent. No problem of causation was involved. The only question was whether the rule of due care protected against such a risk.

In another case a town maintained a catch basin extending two or three feet into a street. A laborer who was working on the street stepped backward into the catch basin to avoid injury from the collision of two cars. The acts of the drivers of the cars were held to be concurrent and not superseding causes, whether the motorists' acts were innocent, tortuous or criminal.[18] Such a risk was protected against by the rule of due care.

Where a boy, a passenger on a bus, was transported to his destination, but the bus parked in violation of the statute, and the boy alighted from the bus and walked around it and was struck by a passing automobile, it was held that the violation of the parking statute by the bus was not the proximate cause of the injury but that the act of the boy in walking around the bus was a superseding agency.[19]

In this case the carrier had performed the duty of transporting the boy and placed him on the shoulder of the highway. The boy was of competent age. It is thought that the real basis of the decision is that the duty imposed by the statute to park the bus parallel with the highway was not designed or intended to protect the interests of a passenger

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[17]Superior Oil Co. v. Richmond, 172 Miss. 407, 159 So. 850 (1935).
[18]Brewer v. Lucedale, 189 Miss. 375, 198 So. 42 (1940).
[19]Miss. City Lines v. Bullock, 194 Miss. 630, 13 So.2d 34 (1943).

who had safely alighted. Therefore, though the bus company had violated the rule, it was not responsible for any injury to the interests of the boy. Another ground might be that a violation of the statute had nothing to do with causing the injury. In other words, the boy being competent and having of his own volition walked from a safe place around the bus and on to the highway, the negligence of the bus company as compared with the part contributed by the act of the boy was so minor as not to be a substantial factor in producing the injury.

It is held that if the occurrence of an intervening force might reasonably have been anticipated, it will not interrupt connection between the original cause and the injury.[20]

And it is held that an intervening act which combines with the negligent act of a third person does not become a superseding interest where it is a normal response to the situation created by the negligence of the third person, and the manner in which it is done is not extraordinarily negligent.[21]

It is held that where the defendant is negligent and this negligence combines with that of another or with any other independent intervening cause, each is liable, although his negligence was not the sole negligence or the sole proximate cause and although his negligence without such other independent intervening causes would not have produced the injury.[22]

Our court has announced that:

> Independent intervening cause, which would interrupt connection between the original cause and injury, is a cause which could not have been reasonably foreseen by defendant while exercising due care.[23]

The court has held that when an act of negligence is a substantial factor in bringing about an injury, it does not cease to be a "legal and proximate cause" thereof, because of the intervention of the subsequent act of negligence of another which contributed to the injury, if the prior act of negligence is still operating and the injury inflicted is not different in kind from that which would have resulted from the prior act.[24]

The court also announces that where one is negligent and another acting independently and voluntarily puts in motion another and inter-

[20]Russell v. Williams, 168 Miss. 181, 150 So. 528 (1933).
[21]Superior Oil Co. v. Richmond, 172 Miss. 407, 159 So. 850 (1935).
[22]Gulf Ref. Co. v. Brown, 196 Miss. 131, 16 So.2d 765 (1944).
[23]Oliver Bus Lines v. Skaggs, 174 Miss. 201, 164 So. 9 (1935); L. & N. R. R. Co., 178 Miss. 69, 172 So. 752 (1937).
[24]Holmes v. T. M. Strider & Co., 186 Miss. 380, 189 So. 518 (1939).

vening cause which efficiently leads in unbroken sequence to injury, the latter is the proximate cause and the original negligence is a remote and non-actionable cause.[25]

Taking the above cases decided in terms of proximate cause, we have the announcement that an intervening cause may sometimes be a superseding cause and relieve from liability, and sometimes not. The question is, of course, under what circumstances and when will the law relieve from liability because of an intervening force.

The problem assumes, according to the definition, that the original negligence of the defendant and the intervening force, whether the act of a third person or a force of nature, are both substantial factors in producing the harmful effects upon the interests of plaintiff. It is thus clear that no cause problem is presented. The only question is whether or not the defendant shall be relieved from liability because of the intervening force, purely a law question.

Since no question of causation is presented, the only grounds for exempting the plaintiff would be that the interests of defendant were not protected as against the risk of defendant's negligence joining with the intervening force to produce the harmful result, or if the interests were so protected by the rule, the defendant had not violated it.

In negligence cases, where the rule is that one must exercise due care so as not to endanger the interests of others, a defendant will be held, as a rule, to the duty of exercising due care as to all risks that a reasonable, prudent man would foresee or should foresee as endangering the interests of a plaintiff. This being true, the first question is whether or not the rule of due care protects against the risk of certain types of intervening forces. The cases answer this in the affirmative. Are there certain types that are not protected against? There is the same answer. What is the basis of decision as to whether in a particular case the risk is or is not protected against?

The basis adopted by the courts, from which the particular rules are deduced, appears to be that such intervening forces as a reasonable, prudent person would or should foresee as not unlikely to happen are protected against. So if a negligent defendant when he acted should have foreseen the not improbable intervention of an intervening force, he is negligent as to this force, its probability being one of the elements determining his negligence, and, therefore, being in fault as to it, is not en-

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[25]Stewart v. Kroger Co., 198 Miss. 371, 21 So.2d 912 (1945).

titled to be relieved from liability even though without such intervention the harm would not have taken place. So the courts have held that a negligent person should foresee as not unlikely to happen the acts of another in normal response to fear inspired by the situation created by his conduct, the normal response of a person in an effort to save himself, his lands or chattels from the negligence of defendant, a person's normal acts in exercising his rights or privileges that have been impeded by the negligence of defendant. Even if the act of the third person be negligent, if foreseen as not unlikely to happen, and even an extraordinary force of nature or a criminal act of a third person, under like circumstances, will not relieve from liability.[26]

The rationale of the test is, of course, that liability is imposed, notwithstanding the intervening force because harm by such an agency is a risk protected against by the rule of due care which the negligent defendant has violated thus producing with its aid the harmful result that the rule seeks to prevent.

It is submitted that if the analysis here presented be correct and realistic, the test for determining whether an intervening force relieves from liability is whether or not a negligent defendant should have foreseen such intervention as an event not unlikely to happen. With deference, the problem presents no question of causation, though practically all of the cases and briefs of lawyers argue in such terms.[27]

A Review Of a Few Cases To Illustrate Application Of Approach Herein Advocated

It might be well to review a few additional cases showing the application of the approach here contended for.

Where cotton was shipped by a railroad to a river landing where it maintained a warehouse for shipment by boat to New Orleans, bill of lading being a through one, the cotton was destroyed by fire which originated in an oil mill that had not been in operation for several weeks. Burning shingles were carried by high wind to the warehouse yard, which was in a trashy condition, and the cotton was destroyed by the fire. Plaintiff brought suit claiming that in view of the condition of the yard and its negligent use, the warehouse was negligent in that it did not ship out the cotton by the first boat. The lower Court charged the jury that if they believed the warehouseman was negligent in not shipping out

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[26]Restatement, Torts §§ 442-453.
[27]Gulf Ref. Co. v. Brown, 196 Miss. 131, 16 So.2d 765 (1944).

the cotton by the first boat, in view of the condition of the yard, the habit of people smoking in the yard and the running of engines therein, it should find for the plaintiff. The plaintiff recovered. Appeal was taken and the case reversed on the ground that the lower court erred in confining the jury to a consideration of the condition of the yard alone in determining negligence and did not take into consideration the probability of fire originating in the oil mill and being carried into the yard by the wind.[28]

Had the cotton been shipped by the first boat, it would not have been burned for it would not have been there. Failure to ship was certainly a substantial factor in causing the loss by fire. This was not questioned.

The rule of due care would certainly require the warehouse to use due care in protecting the cotton from fire, whether the fire originated within or without the yard. The only question in the case was whether the warehouseman had violated the rule. Was he negligent? The concrete question was whether or not he had been negligent with respect to the particular risk encountered, which was the loss of the cotton by fire brought about by burning shingles from an idle oil mill located at some distance from the yard and which had caught fire in some unknown way.

The court held that the question of whether or not failure to ship by the first boat was negligent was properly left to the jury to pass upon; that the jury had decided this and, therefore, the Supreme Court would take this issue as settled. So the court began with the finding that the defendant was negligent in not shipping, but that whether or not this negligence in failing to ship by the first boat proximately caused the damage was a question for the jury and that this was to be decided by the jury, considering, together with the condition of the yard, the probability of fire originating in the oil mill and being carried to the yard by high wind.

It reversed the case that this might be done. The court first makes a causal problem out of the matter, then proceeds to hold that causal connection depended on negligence. So having found the defendant negligent to begin with for not shipping the cotton, the court proceeded to send the case back to the jury to decide whether there was negligence and, therefore, proximate cause.

The only question in the case was whether or not the rule of due care had been violated, that is, was the warehouseman negligent.

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[28]Merchants' Wharf-Boat Assoc. v. Wood, 64 Miss. 661, 2 So. 76 (1887).

We cite this case because the judge who wrote the opinion and some of the lawyers who argued the case in terms of causation were as able, learned and eminent as any that ever lived in our State.

Where a wife and child sued a road contractor, who was in process of building a road, for the death of the husband and father who was thrown from a truck by a jolt caused by a heap of sand piled in the traveled part of the road for use in the work, the defendant was held not liable as a matter of law. The contractor had put up signs easily to be seen saying that the road was under construction and had placed detour signs, but the truck driver followed the road under construction, and drove negligently as was found under the facts.[29]

In this case, the court after setting forth clearly all of the facts entering into the situation, held that the contractor was guilty of no negligence but stated its conclusion, as follows:

> We are of the opinion that the failure of the truck driver to anticipate that his vision might be obscured by the dust from a passing car or truck and his failure to have his own truck under control was the sole and proximate cause of the injury complained of and, therefore, there could be no recovery against the appellant contractor under such circumstances.

Of course, the finding that the contractor was guilty of no negligence made an end of the case and made it immaterial whether the act of the contractor in piling the sand in the highway caused the injury or did not cause it. Undoubtedly the piling of the sand in the traveled way of the road was a material factor in producing the injury. If the sand had not been there, there would have been no jolt and no death.

According to the approach here suggested, the first question would be whether or not the rule of due care protected the interests of those unnecessarily and negligently using the road from the risks of sand, to be used in construction, piled partly in the traveled way. An answer in the negative would have ended the case. The second question, if it were held that this risk was protected against, would be whether or not the contractor violated the rule. If there was such a rule, his piling of the sand certainly violated it and liability would have followed, because there could be no question that the piling of the sand in the traveled way was a substantial factor in producing the result.

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[29]Myers v. Sanders, 189 Miss. 198, 194 So. 300 (1940).

The court in effect held that the rule of due care did protect against the risk, but decided that it had not been violated, that there was no negligence. It decided that the act of the truck driver when driving at a too rapid rate of speed, et cetera, under the circumstances was the sole cause of the injury, which was not true as a matter of reality. It is apparent that the act of the truck driver and of the contractor were both substantial factors in bringing about the death of deceased. We get rid of the contribution of the contractor to the result by the use of the magic words "proximate" and "not proximate," one a blessing and one a curse. We say as to the contractor's cause factor "not proximate" and it is supposed to evaporate and cease to be a cause. We say as to the act of the truck driver "proximate" and there is piled upon him all of the causes that produced the injury, piling of the sand, the dust cloud caused by another vehicle, and all the rest.

If one asks why the act of one is not proximate and the other is, the answer in this case given by the court is that the contractor was not negligent. If this is so, why not stop with this? It is decisive. If the contractor was not negligent, it is wholly immaterial whether the truck driver was negligent or not and likewise wholly immaterial whether the act of the contractor was one of the substantial causes of the death of the deceased.

Where a railroad was negligent in the operation of its train by failure of an engineer and a fireman to keep proper lookout in approaching a road crossing, it was held that damages for fright of the driver, due to the impending injury to her automobile stalled thereon, could not be recovered, the court holding that the negligence was not the proximate cause of this type of injury, the driver having left her car and being some distance away when the car was struck.[30]

Actual causal connection would seem to be clear. The plaintiff suffered fright caused by the danger to her car being demolished by the negligent act of the railroad company in failing to keep proper lookout and stopping the train. The negligence caused the demolition of the car connected with which was the fright. The court, in its opinion, points out that in order to recover for mental harm, she must have received physical injuries. This undoubtedly is correct. The opinion, however, was written in the traditional language of proximate causation. The real ground for decision was that the interests of mental calm were not protected as against negligence in the absence of bodily impact. There was no problem of causation.

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[30]Pietri v. L.&N.R.R. Co., 152 Miss. 185, 119 So. 164 (1928).

Again, a railroad company's switch track extended several hundred yards through an open field or pasture in which cattle were accustomed to range to defendant's knowledge. Several tank cars filled with cotton seed oil broke loose from the train, ran along the switch track to the end thereof, struck a bumper wrecking two of the tank cars and allowing ten thousand gallons of cotton seed oil to escape. The oil ran across the right-of-way and upon the land of others, filling up water holes and low places for several hundred yards in the direction of its flow. The defendant took no precautions relative to the oil and made no effort to remove it; the plaintiff, not knowing of the escape of the oil, did not pen his cattle and two of his cows drank oil and died.[31]

The court disposed of the case by saying that it could not hold that the act of the railroad company was a proximate cause of the damage.

It is obvious that in actuality the negligence of the railroad company, if negligence there was, was a substantial factor in producing the death of the cows unless we say the cows committed suicide. There was no cause problem.

I think all would agree that the rule of due care so to operate its trains as not negligently to injure the property of people living in proximity to the right-of-way would cover the risk of the negligent escape of dangerous articles from the cars of the railroad company. In any event, this is the first question. The second is whether or not the rule was violated. Was the railroad company negligent? Taking the cases cited by the court, it seems that the court in effect held as a matter of law that no negligence was shown.

In a subsequent case, *Lee County Gin Co. v. Middlebrooks*,[32] the court declared that no negligence was the basis of decision in the *Rooks* case, but decided it in terms of causation.[33]

Conclusion

I trust that I have sufficiently illustrated the method suggested for the analysis, arguments and decisions of negligence cases. To summarize the process, it seems to me that all questions of legal liability

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[31]Ala. & V'burg R.R. Co. v. Rooks, 78 Miss. 91, 28 So. 821 (1900).

[32]161 Miss. 422, 427, 137 So. 108,108 (1931).

[33]Additional cases of interest for purposes of analysis are: Miss. Export R.R. Co. v. Summers, 194 Miss. 179, 11 So.2d 429 (1943); Brewer v. Lucedale, 189 Miss. 375, 198 So. 42 (1940); Coca-Cola Bottling Co. v. Hand, 186 Miss. 893, 191 So. 674 (1939); Cox v. Dempsey, 177 Miss. 678, 171 So. 788 (1937); Whitley v. Holmes, 164 Miss. 423, 144 So. 48 (1932); Rhodes v. Fullilove, 161 Miss. 41, 134 So. 840 (1931); Victor Sparkler v. Specialty Co. v. Price, 146 Miss. 192, 111 So. 437 (1927); L.&N.R.R.Co. v. Daniels, 135 Miss. 33, 99 So. 434 (1924).

should be decided under the inquiry as to whether or not the human interests claimed to be invaded are protected by the rule of law invoked from the particular risk encountered. Whatever the facts may be, as finally settled, whether or not liability will be imposed upon the defendant is purely a legal question, whatever the reasons and policies of the law may be for imposing or withholding it.

The rest of the case consists in deciding whether or not the defendant has violated the rule of law invoked, which is essentially a fact question. The next inquiry is whether the violation was a material factor in producing the invasion of interests protected by the rule invoked as against the particular risk encountered.

Assuming a rule that protects, and a violation causing damage thereby, the damage element is simply a process of evaluating in money the damage to the protected interest or interests.

In this analysis any act or failure to act that is a material factor in producing the harmful result is to be treated as a cause. Whenever there is such a cause, a refusal to impose liability, regardless of the language of the court, is never because the act or failure to act is not such in fact, but such ruling is based on some policy of the law out of which the ruling of non-liability arises.

In my opinion, there should never be submitted to the jury the question, whether or not a given act or failure to act is a proximate cause. What should be submitted is whether or not it was a material factor. It being so decided, it is for the law to say whether liability shall follow or not.

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FEDERAL REGULATION OF POLITICAL ACTIVITY

The recent enactment of the highly controversial Labor Management Relations Act,[1] popularly known as the Taft-Hartley Act, contained a provision[2] which has invoked much discussion as to the validity and constitutionality of federal legislation regulating free exercise of political activity by individuals and organizations. The expanding control of the central government over federal elections is but a part of the enormous growth of the federal power within the past two decades. This growth has caused great concern in the minds of those who fear "bureaucratic" government. Many others, however, feel that such a powerful, centralized government, capable of counteracting the ever-growing strength of labor unions and large corporations, is an absolute necessity.

The advisability or necessity for any limitation or regulation on political activity is to a great degree a political question;[3] what is of importance from a legal aspect is the right or authority of Congress so to regulate in the event it feels the need to do so. The federal government is limited in all its spheres of activity by the Constitution of the United States, and any laws it promulgates have force only as authorized by the Constitution of the United States.[4] Hence a study of the validity of the various federal statutes controlling campaigns and election to federal office must be based on juridical interpretations of the provisions of the Constitution applicable to the situation.[5]

The right to engage in political activity, of any kind, is one of the attendant rights of suffrage,[6] and the right to control suffrage includes the right to control actions preliminary to it, where they affect the final result. Contrary to ordinary lay opinion, the right of suffrage is not an

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[1]Pub. L. No. 101, 80th Cong., 1st Sess., c. 120 (June 3, 1947), 1947 U.S.C., c. 120.

[2]Tit. 3, § 304, amending § 313 of the Federal Corrupt Practices Act of 1925, 2 U.S.C.A. § 251, to prohibit national banks and corporations, labor organizations, and all corporations from making contributions or expenditures in connection with any election for a federal office, or any primary election, political convention, or caucus to select candidates, concerning a federal office.

[3]United Public Workers of America (C.I.O.) v. Mitchell, 67 S.Ct. 556 (1947); Burroughs v. United States, 290 U.S. 534 (1934).

[4]Newberry v. United States, 256 U.S. 232 (1921); United States v. Bathgate, 246 U.S. 220 (1918); James v. Bowman, 190 U.S. 127 (1903); United States v. Cruikshank, 92 U.S. 542 (1875).

[5]U. S. Const. Art. I, § 4; U. S. Const. Art. I, § 8, cl. 18; U. S. Const. Art. II, § 1; U. S. Const. Amend. XII; U. S. Const. Amend. XIV; U. S. Const. Amend. XV. Limitations on federal power, U. S. Const. Amend. I; U. S. Const. Amend. X.

[6]United States v. Golman, Fed.Cas.No. 15,225, 3 Woods 187 (C.C.D.La. 1878); State, *ex rel.* McGrael v. Phelps, 144 Wis. 1, 128 N.W. 1041 (1910).

inherent right of the people,[7] but is a "political right,"[8] subject to the control of the state governments,[9] limited only by the bounds of "reasonableness" derived from the limitations of the 1st, 14th, and 15th Amendments to the Federal Constitution.[10] In the case of federal elections only, there is a concurrent and paramount right of control by Congress,[11] granted by those sections of the Constitution dealing with Congressional

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[7]Minor v. Happersett, 21 Wall. 162 (U.S. 1874); Commonwealth v. Gibbs, 4 Dall. 253, 3 Yeates 429, (U.S. 1802). But where every qualification is shown to be complete, the citizen possessing them is entitled to vote. United States *ex rel.* Wallach v. McCormich, Fed.Cas.No. 15,660a, 2 Hayw.&H.C.C. 156 (C.C.D.Col. 1854).

[8]Pirtle v. Brown, 118 F.2d 218, 139 A.L.R. 557 (C.C.A. 6th 1941).

[9]Breedlove v. Suttles, 302 U.S. 277 (1937); Pope v. Williams, 193 U.S. 621 (1904); Smith v. Blackwell, 34 F.Supp. 989 (D.C.E.D.S.Car. 1940); United States v. Crosby, Fed.Cas.No. 14,893, 1 Hughes 448 (C.C.D.S.Car. 1871). The right or privilege of voting is one arising under the constitution of the state, and not under the Constitution of the United States. United States v. Anthony, Fed.Cas.No. 14,459, 11 Blachf. 200, 5 Chi.Leg.N. 462, 17 Int.Rev.Rec. 197, 30 Leg.Int. 266, 5 Leg.Op. 63 (C.C.N.D.N.Y. 1873).

[10]U. S. Const. Amend. I guaranteed freedom of speech, press, and assembly. U. S. Const. Amend. XIV has been interpreted as extending this guarantee to operate as a limitation on state action. This is not considered an absolute right; but in order to prohibit same, the state must show its exercise would be abusive, or that serious evil would result. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Bridges v. State of California, 314 U.S. 252, 159 A.L.R. 1346 (1941); DeJonge v. Oregon, 299 U.S. 353 (1936). U. S. Const. Amend. XIV forbade state laws depriving citizens of their privileges or immunities; was directed only to the states, and not to individuals; United States v. Harris, 106 U.S. 629 (1882); United States v. Cruikshank, 92 U.S. 542 (1875); protected only those rights and immunities arising from the Federal Constitution, and not those springing from other sources. Maxwell v. Dow, 176 U.S. 581 (1900); Breedlove v. Suttles, *supra* note 9; Minor v. Happersett, 21 Wall 162 (U.S. 1802). U. S. Const. Amend. XV provided against denial or abridgement of the right to vote on account of race, color, or previous condition of servitude. Directed only toward state action. Grovey v. Townsend, 295 U.S. 45 (1935); James v. Bowman, 190 U.S. 127 (1903); Karem v. United States, 121 F. 250, 57 C.C.A. 486 (C.C.A. 6th 1903). Is the sole source of federal power over state or local elections, and that power is limited to the specified discriminations. United States v. Reese, 92 U.S. 214 (1875); Lackey v. United States, 107 F. 114 (1900), *cert.den.* 181 U.S. 621 (1901); United States v. Bevin, 46 F. 381 (C.C.E.D.Va. 1891); United States v. Munford, 16 F. 223 (C.C.E.D.Va. 1883). Restrictions held to be reasonable include poll tax, registration requirements, ability to read and interpret the constitution. Breedlove v. Suttles, *supra* note 9; Pope v. Williams, *supra* note 9; Thudeau v. Barnes, 65 F.2d 563 (C.C.A. 5th 1933), *cert. den.* 290 U.S. 659 (1933). Declared unreasonable were the famous "grandfather clauses," certain types of registration requirements, and exclusion of Negroes from primaries. Lane v. Wilson, 307 U.S. 268 (1939); Myers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347 (1915); Green v. Mills, 159 U.S. 651 (1895); Nixon v. Condon, 286 U.S. 73, 88 A.L.R. 458 (1932).

[11]United States v. Classic, 313 U.S. 299 (1941); United States v. Moseley, 238 U.S. 383 (1915); *Ex parte* Siebold, 100 U.S. 371 (1879). In the words of Alexander Hamilton, Essay No. LIX, Federalist (mentioned in *United States v. Gradwell, 243 U.S. at 484 (1917))*, "They [the constitutional convention] have submitted the regulation of elections for the federal government, in the first instance, to the local administrations; which, in ordinary cases, and when no improper views prevail, may be both more convenient and more satisfactory; but they have reserved to the national authority a right to interpose, whenever extraordinary circumstances might render that interposition necessary to its safety."

elections,[12] presidential elections,[13] and the "necessary and proper" clause.[14] It is with the development of federal power that this note is concerned.

With the exception of an uncontested statute changing the election of representatives to Congress from selection on a single state ticket to selection by districts,[15] it was the policy of Congress for nearly one hundred years after formation of the government in 1789, to leave the regulation of elections and political activity almost entirely to the states.[16] It was in 1870 that the federal government took its first step into this field. The opposition to Negro suffrage in the South at the conclusion of the War Between the States, the passage of the 14th and 15th Amendments to the Federal Constitution, and the inability of the state governments to cope with the situation, led to the enactment of the so-called "Enforcement Acts."[17] These Acts made it a penal offense against the United States to violate state laws[18] against false registration, bribery or intimidation of voters, voting without legal right, making false returns of an election count, interfering with an election official, and neglect of duty by such election officials.[19] They also provided against deprivation of a citizen's rights or immunities,[20] for the appointment of election super-

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[12]U. S. Const. Art. I, § 4, gave Congress power to regulate the "time and manner" of holding elections for senators and representatives to the Congress. U. S. Const. Amend. XIV, §§ 2, 3; U. S. Const. Amend. XVII; U. S. Const. Amend. XX, § 1.

[13]U. S. Const. Art. II, § 1, prescribed the manner of election; U. S. Const. Amend. XII, U. S. Const. Amend XIV, §§ 2, 3; U S. Const. Amend, XX, §§ 1, 3.

[14]U. S. Const. Art. I, § 8, cl. 18.

[15]5 STAT. 491 (1842). Also, later statute fixed time of electing senators. 14 STAT. 243 (1866).

[16]Another unimportant statute, of such limited application that it was not influential in the trend, prohibited workmen in the Navy yard from soliciting poliitcal contributions from one another. REV. STAT. § 1546 (1867).

[17]Act of May 31, 1870, 16 STAT. 144 *et seq.;* and Act of July 14, 1870, 16 STAT. 254. See REV. STAT. 5506 *et seq.* (1873).

[18]As a means of enforcing powers granted the federal government by the Constitution, the Congress may adopt the statutes of the various states, and enforce them by its own sanctions. *In re* Coy, 127 U.S. 731 (1887); United States v. Gale, 109 U.S. 65 (1883); *Ex parte* Clarke, 100 U.S. 399 (1879); United States v. Quinn, Fed.Cas.No. 16,110, 8 Blatchf. 48, 3 Am.LawRep.U.S.Cts. 180, 12 Int.Rev.Rec. 151 (C.C.S.D.N.Y. 1870).

[19]Constitutionality of prohibitions upheld, but to sustain indictment, the violation must have been done with an intent to affect that part of the election pertaining to selection of representatives to Congress. United States v. Brewer, 139 U.S. 278 (1890); United States v. Brewer, 139 U.S. 278 (1890); United States v. Bevin, 46 F. 381 (C.C.E.D.Va. 1891); United States v. Jackson, 25 F. 548 (C.C.W.D.Tenn. 1886); United States v. Badder, 16 F. 116 (C.C.E.D.La. 1883); United States v. Hall, Fed.Cas.No. 15,282, 3 Chi.Leg.N. 260, 13 Int.Rev.Rec. 181 (C.C.S.D.Ala. 1871); cases cited note 18 supra.

[20]This section was declared invalid on the grounds that the right of suffrage was not a Constitutional right, and the federal government could protect only those rights and immunities secured to the citizens by the Federal Constitution. James v. Bowman, 190 U.S. 127 (1903); United States v. Cruikshank, 92 U.S. 542 (1875);

visors by federal circuit judges, and for the appointment of special deputies by federal marshals to keep peace at elections.[21] The constitutionality of these acts, insofar as they applied to elections for members to Congress, was upheld as a valid exercise of power granted by Article 1, Section 4 of the Federal Constitution, giving Congress authority to regulate the "times and manner" of holding elections for senators and representatives.[22] The limitations placed on the acts by the judiciary were: that they did not apply to elections wherein no member of Congress was to be selected;[23] that they were not applicable to elections for presidential electors;[24] and that they protected only such rights and immunities as were secured to citizens by the Federal Constitution.[25] After a period of twenty-four years, the acts were repealed.[26] Several sections of them were later reenacted as a part of the Criminal Code, and are still on the statute books.[27]

The next federal restriction on political activity was levied against members of the federal classified service. The Civil Service Act of 1876 contained a provision against political contributions of money or property by these public servants,[28] and, as amended in 1883, the act granted to the president all powers necessary to prevent any government employee from "using his official authority or influence to coerce the political action of any person or body."[29] Under authority of the latter section, President McKinley in 1907 issued a proclamation, in the form of a Civil Service Rule,[30] prohibiting classified employees from taking an active part in political management or in political campaigns, and permitting them only to vote, and to express "privately" their opinions on political subjects and candidates. In 1882, the act received its first judicial test. In the famous case of Ex parte *Curtis*,[31] after a lower federal court had

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United States v. Reese, 92 U.S. 214 (1875). But see, *Ex parte* Yarbrough, 110 U.S. 651 (1884), famous Ku-Klux-Klan case. Further, U. S. Const. Amend. XIV was directed solely to state action, and not to actions of individuals. United States v. Harris, 106 U.S. 629 (1882).

[21]See cases cited note 19 *supra*.

[22]See cases cited notes 18, 19, 20, and 21, *supra*.

[23]The sole power of Congress to legislate on the subject of state or local elections rests upon U. S. Const. Amend. XV, and that is limited to discrimination for race, color, or previous condition of servitude. United States v. Cruikshank, 92 U.S. 542 (1875); United States v. Reese, 92 U.S. 214 (1875); Karem v. United States, 121 F. 250 (C.C.A. 6th 1903).

[24]McPherson v. Blacker, 146 U.S. 1 (1892); *In re* Green, 134 U.S. 377 (1890).

[25]Cases cited note 20 *supra*.

[26]Act of Feb. 8, 1894, 28 STAT. 36.

[27]Secs. 19, 20 of the Criminal Code, relative to conspiracies to intimidate citizens from voting and deprivation of rights and immunities. REV.STAT. 5508, 5510, Act of Mar. 4, 1909, 35 STAT. 1092, 18 U.S.C.A. §§ 51, 52.

[28]Act of Aug. 15, 1876, c. 287, § 6, 19 STAT. 169; 18 U.S.C.A. § 213.

[29]Act of June 16, 1883, c. 27, 22 STAT. 403; 5 U.S.C.A. § 632 *et seq.*

[30]Civ.Serv.Rule I, 5 C.F.R. 1943 Cum.Supp. 1.1.

[31]*Ex parte* Curtis, 106 U.S. 371 (1882).

espoused the validity and constitutionality of the particular provisions of the act,[32] the United States Supreme Court established the doctrine that an active partisan governmental personnel threatens good administration:

> the purpose of Congress in all this class of enactments has been to promote efficiency and integrity in the discharge of official duties, and to maintain proper discipline in the public service. Clearly such a purpose is within the just scope of legislative power and it is not easy to see why the Act now under consideration does not come fairly within the legitimate means to such an end.[33]

This doctrine was to have much influence in later litigation,[34] and was even used to uphold the conviction of a member of Congress, under an indictment based on the Corrupt Practices Act of 1925, for solicitation of political contributions from members of the classified service.[35]

In the year of 1907, the Congress extended its control to include national banks and corporations. A section was added to the Criminal Code[36] which prohibited these organizations from making money contributions in connection with any election to any federal political office. The constitutionality of this act was upheld as a valid exercise of the power of Congress to protect electors in their right to vote for federal representatives.[37]

In 1910, the federal legislative body augmented its growing desire to purify federal elections by expanding its control to the candidates themselves, who seek federal office. The first Federal Corrupt Practices

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[32]United States v. Curtis, 12 F. 824 (C.C.S.D.N.Y. 1892). At page 839, "In executing its power to prohibit acts of officers or employees which are incompatible with the proper discharge of their duties, or which impair the efficacy, or tend to demoralize the public service, Congress must exercise its judgment and discretion in determining what acts are or are not of such a pernicious character and tendency. . . It is only when Congress has palpably transgressed the limits of its discretion that the judiciary department will intervene."

[33]106 U.S. at 373 (1882).

[34]United States v. Thayer, 209 U.S. 39 (1907). In this case postal employee received letter soliciting political contribution in the place of his employment. United States *ex rel.* Taylor v. Taft, 203 U.S. 461 (1906), where a War Department clerk published an article containing a derogatory remark about the president; United States v. Cason, 39 F.Supp. 730 (D.C.W.D.La. 1940), where a classified employee solicited money for a newspaper published by a political faction; United States v. Smith, 163 F. 926 (D.C.Ala. 1908), postmaster received request for political contribution in letter delivered to him in his office; Morgan v. Nunn, 84 F. 551 (C.C.M.D.Tenn. 1898), preventing removal of Civil Service employee for political purposes; Page v. Moffett, 85 F. 38 (C.C.D.N.Y. 1898); Carr v. Gordon, 82 F. 373 (C.C.N.D.Ill. 1897). Also, see cases cited under subsequent discussion of Hatch Act provision against active participation in political campaigns by members of executive department.

[35]United States v. Wurzbach, 280 U.S. 396 (1929).

[36]Cr. Code § 83, Act of Jan. 26, 1907, c. 420, 34 STAT. 864.

[37]United States v. United States Brewer's Assn., 239 F. 163 (D.C.Pa. 1916)

Act,[38] passed in that year, limited the amount of campaign expenditures, required the submission of statements as to such expenditures, and prohibited promise of governmental employment in return for support at the polls. The terms of the act limited its application to elections to Congrss, but did make it applicable to primary elections, as well as general elections. The sanctions were unanimously upheld as a valid exercise of the power of Congress to control general elections,[39] but the terms relating to primary elections were not so considered. The Supreme Court declared in the celebrated case of *Newberry v. United States* that the Congress had no authority over primary elections, which are "in no sense elections for office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors."[40] This principle was to stand for another twenty years, until the year 1941, when it was overruled in *United States v. Classic,* "where the primary is by law [of the state] made an integral part of the election machinery."[41]

The Corrupt Practices Act was rewritten in 1925,[42] with similar provisions, but the permissible amount of campaign expenditures was changed and a section was incorporated against contributions by federal banks and corporations, formerly part of the Criminal Code.[43] Among subsequent decisions declaring the rewritten act constitutional[44] was one notable for a change in former judicial opinion. *United States v. Burroughs,* in 1934, overruled previous decisions that Congress had no constitutional authority to control elections for presidential electors:

> To say that Congress is without power to pass appropriate legislation to safeguard such an election from the improper use of money to influence the result is to deny to the nation in a vital particular

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[38]Act of June 25, 1910, c. 392, 36 STAT. 822 *et seq.* Amended Act of August 19, 1911, c. 33, 37 STAT. 25 *et seq.* Another federal statute of little importance to this trend required the election of congressmen to be from districts composed of contiguous, compact territory containing practically equal population; the states themselves were to set the districts by state laws. Act of Aug. 8, 1911, c. 5, 37 STAT. 13, 2 U.S.C.A. 2 *et seq.* Upheld, Mahan v. Hume, 287 U.S. 575 (1932); Smiley v. Holm, 285 U.S. 355 (1931).

[39]Newberry v. United States, 256 U.S. 232 (1921); United States v. Gradwell, 243 U.S. 476 (1917); United States v. Cameron, 282 F. 684 (D.C.Ariz. 1922).

[40]256 U.S. at 250 (1921). This case definitely established the rule first mentioned, but not clearly emphasized, in *United States v. Gradwell, supra* note 39. Subsequently followed in *Seymour v. United States,* 77 F.2d 577 (C.C.A. 8th 1935); *United States v. Cameron, supra* note 39.

[41]313 U.S. 299, 318 (1941).

[42]Act of Feb. 28, 1925, c. 368, 43 STAT. 1070 *et seq,* 2 U.S.C.A. § 241 *et seq.*

[43]Cr.Code § 83, Act of Jan. 26, 1907, c. 420, 34 STAT. 864, as reenacted in Act of March 4, 1909, c. 321, 35 STAT. 1103.

[44]Validity was only questioned twice. United States v. Burroughs, 290 U.S 534 (1934); Seymour v. United States, 77 F.2d 577 (C.C.A. 8th 1935).

> the power of self-protection. Congress undoubtedly possesses that power, as it possesses every other power essential to preserve the departments and institutions of the general government from impairment or destruction.[45]

The advent of the supremacy of the Democratic Party in Congress in 1932 marked the most epochal stage in the history of federal regulation of political activity. Prohibitions and restrictions were to be incremented beyond control of federal servants and corporations, candidates for federal office, and those actions which were generally considered corruptive and illegal, to acts by the public at large that had never before been thought *malum per se,* or even improper. In 1935, a clause was inserted in the Public Utility Holding Companies Act[46] prohibiting *any* contributions by registered public utility holding companies to *any* political party, or in support of *any* political campaign. The judiciary did not even doubt its constitutionality.[47] Then in 1939, the climactic point was reached in the passage of the Pernicious Political Activities Act,[48] generally called the Hatch Act.

The startling measure of the Hatch Act lay not with any extension of control over state or local elections, but in the magnitude of its application as to the number of persons concerned, and the kinds of activity classified as "pernicious." Not only were *all* officers and employees of the administrative branch of the government, with the exception of those at the very top,[49] prohibited from taking an active part in political management and activity, other than "the right to vote as they choose and to express their opinions on all political subjects and candidates"; but the sanction was extended to state or local agency employees "whose

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[45]290 U.S. at 545 (1934).

[46]Act of Aug. 26, 1935, c. 687, Tit. I, § 12, 49 STAT. 823, 15 U.S.C.A. § 791(h).

[47]Egan v. United States, 137 F.2d 369 (C.C.A. 8th 1943), *cert. den.* 320 U.S. 788 (1943).

[48]Act of Aug. 2, 1939, c. 410, 53 STAT. 1147 *et seq,* as amended Act of July 19, 1940, c. 640, 54 STAT. 767; Act of March 27, 1942, c. 199, Tit. VII, § 701, 56 STAT. 181; Act of Aug. 8, 1946, c. 904, 60 STAT. —; 18 U.S.C.A. § 61a *et seq.*

[49]§ 9 of the Act, 19 U.S.C.A. § 61h, exempted from the restriction, (1) the President and Vice President of the United States, (2) persons whose compensation is paid from the appropriation for the office of the President, (3) heads and assistant heads of executive departments, (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the nation-wide administration of federal laws; and employees of The Alaska Railroad, residing in municipalities on the line of the railroad, were exempted, in respect to activities involving the municipality in which they resided. 18 U.S.C.A. § 61p allowed participation where the municipality or political subdivision was involved, in cases of localities where the majority of the voters are federal employees, if in the "domestic interest."

principal employment was in connection with any activity financed in whole or in part by loans or grants made by the United States."[50] Considering the proportions of federal appropriations in connection with state or local aid at the present time, it is obvious that several million persons are now prevented from actively assisting their political candidates and ideals.

There has been little disbelief as to the right of Congress to place this restriction on the administrative branch. A historical study of various limitations on different activities of governmental employees will show a unique paucity of dissent as to the right of the federal government "reasonably" to restrict the actions of its public servants.[51] However, in 1947, in *United Federal Workers of America (C.I.O.) v. Mitchell*,[52] the point was hotly contested as a violation of the constitutional guaranty of free speech and assembly,[53] that the restriction was too broad in its provisions, and was discriminatory against a great mass of people. The United States Supreme Court answered these contentions by reaffirming the "legitimate means" doctrine, and stating that "even fundamental human

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[50]18 U.S.C.A. § 61L. The penalty assessed against the state, if it refused to remove the guilty employee, was the withholding of a sum equal to two years salary of the individual.

[51]It is an old, and well-settled doctrine that "The interference of the courts with the performance of the ordinary duties of the executive departments would be productive of nothing but mischief; and we are quite satisfied that such a power was never intended to be given to them." Decatur v. Paulding, 39 U.S. 497, 516 (1840). See United States v. Eliason, 16 Pet. (U.S.) 291 (1842); United States *ex rel* Taylor v. Taft, 203 U.S. 461 (1906). Some uncontested restrictions placed on governmental employees include prohibitions against: certain treasury department employees owning sea vessels, purchasing and disposing of securities, Rev. Stat. § 243 (1789); clerks in the treasury department carrying on business in the funds or debts of the United States, or in any kind of public property, Rev. Stat. § 244 (1791); judges of the federal judiciary acting as attorneys or counsel, Rev. Stat. § 713 (1812); any officer of the United States holding a place of trust or profit, or discharging official functions for the United States, acting as an agent or attorney for the prosecution of a claim against the United States, Rev. Stat. § 5498 (1853); members of Congress practicing in the Court of Claims, Rev. Stat. § 1058 (1863); any officer or employee of the United States requesting a political contribution from workmen in the Navy yard, Rev. Stat. § 1546 (1867); members of Congress being interested in contracts with the United States, Rev. Stat. § 3739 (1868); officers or employees of the United States soliciting or receiving contributions, gifts, or donations, from other employees or officers for an officer or employee in a superior position, Rev. Stat. § 1784 (1870). Army personnel have long been under this restriction, Army Regs. No. 600-10, p.5.

[52]67 S.Ct. 556 (1947).

[53]This was the first time that U. S. Const. Amend. I has been interposed as in conflict with restrictive control of federal employees. Mr. Justice Black, in his able dissent, considered the Act to be violative of the guarantee, citing well-considered cases of *Marsh v. State of Alabama*, 327 U.S. 501 (1946); *Bridges v. State of California*, 314 U.S. 252, 159 A.L.R. 1346 (1941); *Thornhill v. State of Alabama*, 310 U.S. 88 (1939).

rights" are not absolute.[54] It further held that the Congress may regulate the political conduct of governmental employees within reasonable limits even though the regulation entrenches to some extent upon unfettered political action, that the extent of such regulation lies primarily with Congress, and the courts can interfere only when such interference passes beyond the general existing conception of governmental power, as developed from practice, history, and changing educational, social, and economic conditions.[55] The same day, in a case involving the provision relative to state employees, it dismissed the question of an invasion of the employee's personal rights in a single sentence, without discussion.[56]

The extension of this sanction to state and local employees was not accepted as readily, and it has been questioned several times. The clause has been attacked as: (1) an invasion of states' rights;[57] (2) as violative of the 10th Amendment;[58] (3) as coercive;[59] and (4) as an unconstitutional delegation of legislative or judicial authority to the Civil Service Commission.[60] Constitutionality of the section was upheld in each instance, with response to the effect that: (1) the federal government may validly offer benefits to a state dependent upon cooperation with federal plans for the general welfare;[61] (2) it was a resort to a means appropriate and plainly adapted to the exercise of a granted power;[62] (3) an alternative was offered, and the penalty was not compulsory;[63] and (4) the action of the Commission was a mere determination of the proper application of policies and standards laid down by Congress.[64]

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[54]Citing as an example, Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). In this case freedom of speech was held not to include the right to curse a policeman. DeJonge v. Oregon, 299 U.S. 353 (1936): Court held that a state legislature can prohibit free speech and assembly where failure to do so would allow abuse of others' rights by stimulating violence and crime. Reynolds v. United States, 98 U.S. 145 (1878), where Mormon religion required polygamy.

[55]Note that the question of a violation of U. C. Const. Amend. V, by virtue of discrimination, was not answered.

[56]State of Oklahoma v. United States Civil Service Comm., 67 S.Ct. 544 (1947).

[57]State of Oklahoma v. United States Civil Service Comm., *supra* note 56; Neustein v. Mitchell, 52 F. Supp. 531 (D.C.S.D.N.Y 1943); Stewart v. United States Civil Service Comm., 45 F.Supp. 697 (D.C.N.D.Ga. 1942).

[58]State of Oklahoma v. United States Civil Service Comm., 67 S.Ct. 544 (1947); State of Ohio v. United States Civil Service Comm., 65 F.Supp. 776 (D.C.Ohio 1946); Neustein v. Mitchell, *supra* note 57.

[59]Cases cited notes 57, 58 *supra.*

[60]State of Oklahoma v. United States Civil Service Comm., 153 F.2d 280 (C.C.A. 10th 1946), *cert. granted* 66 S.Ct. 1342 (1946). § 12 of the Act, 18 U.S.C.A. § 61L (B.C.D.), made the Civil Service Commission the investigative agency, the reviewing agency, and the agency ordering the withholding of proper funds.

[61]Cases cited note 57 *supra.*

[62]Cases cited note 58 *supra.*

[63]Cases cited note 59 *supra.*

[64]Case cited note 60 *supra.*

The other sections of the Act, excluding a "separability" clause, a penalty clause, and temporary clauses, made illegal certain political practices that had not been prohibited previously. In addition to prohibitions against coercion and intimidation of voters, improper use of official governmental authority, and promise of office or employment for support, which had been recognized in earlier acts,[65] the Act classified as "pernicious," and made illegal, membership in an organization advocating overthrow of the constitutional form of government, making available to political committees lists of federal employees, expenditures by political parties in excess of a stipulated amount, contributions by independent contractors under contract with the federal government, and contributions by *anyone* in excess of a certain amount. Only one reported case has come before the judicial department as a violation of these restrictions, and it was dismissed without discussion of their constitutionality, on the grounds that the indictment should have been based on another statute.[66]

Two more encroachments upon unfettered political activity by the general public have gone into the halls of Congress and emerged as law. One, the War Labor Disputes Act,[67] contained a section prohibiting political contributions by corporations and labor organizations. This particular section has never been construed. One case upheld the constitutionality of the Act,[68] but the issue was based upon another section. Since a "separability" clause was included, and the Act by its own terms expired six months after cessation of hostilities, the validity of the prohibitive clause probably will not be judicially determined. The other prohibition is contained in the aforementioned Taft-Hartley Act,[69] and was actually a reenactment of the above clause, making it permanent. Many voices have been raised by labor leaders threatening a test of the

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[65]Crim.Code § 19, 20, 18 U.S.C.A. § 51, 52; Corrupt Practices Act of 1910, c. 392, 36 STAT. 822. Army and Naval personnel had been prohibited from improper use of authority to influence elections by Act of Mar. 4, 1909, c. 321, 35 STAT. 1092. This was an extension to all governmental officials.

[66]United States v. Malphurs, 316 U.S. 1 (1942), where W.P.A. employee was threatened with loss of job if he did not vote for a specified candidate. The indictment could have been sustained under the Emergency Relief Appropriations Act of 1939, § 30(a) 53 STAT. 927, 937, 15 U.S.C.A. §§ 721, 728, which applied sanctions to such a practice.

[67]War Labor Disputes Act of June 25, 1943, c. 144, 57 STAT. 163, 50 U.S.C.A. Appx. 1501-1551. § 1509 amended Federal Corrupt Practices Act of 1925, § 313, 2 U.S.C.A. § 251, to include labor organizations and all corporations. Separability clause was in § 1511, and termination clause was § 1510.

[68]United States v. Montgomery Ward Company, 59 F.Supp. 408 (D.C.Ill. 1945), *cert.den.* 324 U.S. 858 (1945), *reh.den.* 324 U.S. 858 (1945), *rev.* 150 F.2d 369 (C.C.A. 7th 1945), *vacated* 326 U.S. 690 (1945).

[69]See note 2 *supra*.

constitutionality of the restriction, but to this date they have not obtained a judicial decision on the matter.

It is to be noted in surveying this subject that the increase of federal control and regulation over political activity, in connection with federal elections, has paralleled the growth of other powers of the central government. The Second World War seemed to prove the expediency and need for such centralization. The complexity of the modern economic structure is even more influential in evidencing the necessity. The main factors against increased federal control are the interference with individual freedom, and the possibility of improper administration of needed regulation. This, of course, will depend upon how much farther this growth is to continue. Almost all regulation of political activity has thus far been upheld as reasonable, but has reasonableness reached the saturation point? Will there be more regulation? If so, what is to be its effect upon the republican form of government guaranteed by the United States Constitution?

Loyd L. Beacham, Jr.

Liability of Charitable Hospitals for the Negligence of Servants Resulting in Injury to Patients

Introduction

Hospitals may be divided into three general classes—public, private, and private eleemosynary or charitable.[1] It is important to distinguish between the classes because of the different rules applied as to the liability of such institutions for the negligence of servants. Generally speaking, public hospitals, created and maintained by the state or its subdivisions, are not liable for the negligence of their servants.[2] On the

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[1]A corporation, the object of which is to provide a general hospital for sick persons, having no capital stock nor provision for making dividends or profits, deriving its funds mainly from public and private charity and holding them in trust for the object of sustaining the hospital, and conducting its affairs for the purpose of administering to the comfort of the sick, without expectation or right on the part of those immediately interested in the corporation to receive compensation for their own benefit, is a public charitable hospital. 10 Am.Juris. 685; McDonald v. Mass. Gen. Hospital, 120 Mass. 432, 21 Am.Rep. 529 (1876). The fact that a charitable hospital requires patients to pay for their board when able, does not render the hospital less a charity. St. Vincent's Hospital v. Stine, 195 Ind. 250, 144 N.E. 537, 33 A.L.R. 1631 (1924); Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912).

[2]Public hospitals are held to be governmental agencies brought into being to aid in the performance of the public duty of protecting society from individuals unfortunate or incompetent in mind or body and the rules applicable to municipal corporations and public officers generally are applied. Benton v. City Hospital, 140 Mass. 13, 1 N.E. 836, 54 Am.Rep. 436 (1885); Maia v. Eastern State Hospital, 97 Va. 507, 34 S.E. 617, 47 L.R.A. 577 (1899).

other hand, private hospitals may be held responsible for the torts of servants under the same rules which are applied to corporations generally or to individuals.[3] There is considerable variance among the courts as to liability of charitable hospitals for the negligence of servants. The theories on which liability is predicated or denied are greatly varied also. An attempt will be made in this note to analyze and discuss the non-liability and liability theories and to call the reader's attention to some of the criticisms directed at such theories.

Non-Liability Theories

There is a great diversity of opinion among courts which agree in their ultimate conclusion that a charitable hospital is exempt from liability for the torts of its servants. Some courts in the acceptance of the same nominal non-liability theory use different reasoning as the basis for their acceptance. Other courts accept several of the outstanding theories as a basis of exemption from liability. The resulting confusion makes it impossible to classify certain jurisdictions as being proponents of any one theory in support of what may be termed the general rule, namely, that a patient who receives an injury from the negligent acts of the servants of a charitable hospital at a time when he is accepting the benefits of the hospital cannot recover for his injury.[4] This general rule is followed in Mississippi.[5]

The principal theories used by the courts as a basis for the acceptance of the general rule are as follows:

Trust Fund Theory: The trust fund doctrine, one of the older non-liability theories, had its origin in an English case decided in 1848.[6] The reasoning on which the theory is based is that, since the funds of the charitable institution are held in trust for a particular charitable purpose, it is a breach of that trust to apply them to any other purpose. The payment of damages occasioned by the torts of the servants of such institution would result in an unlawful diversion of the trust funds.[7] This doctrine is based on a principal of expediency; that is, the preservation of charitable funds is more desirable than a right to compensation from such funds for an injury inflicted by the operation of the charity.[8]

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[3]Gardner v. Newnan Hospital, 58 Ga.App. 104, 198 S.E. 122 (1938); Richardson v. Dumas, 106 Miss. 664, 64 So. 459 (1914).

[4]Paterlini v. Memorial Hospital, 241 F. 429, 160 C.C.A. 49 (1918); Burdell v. St. Luke's Hospital, 37 Cal.App. 310, 173 P. 1008 (1918); St. Vincent's Hospital v. Stine, 195 Ind. 250, 155 N.E. 537, 33 A.L.R. 1361 (1924); Magnuson v. Swedish Hospital, 99 Wash. 399, 169 P. 828 (1918).

[5]Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930).

[6]Heriot's Hospital v. Ross, 12 Clark & F. 507, 8 Eng. Rep. 1508 (1848).

[7]McDonald v. Mass. Gen. Hospital, 120 Mass. 432, 21 Am.Rep. 529 (1876).

[8]St. Mary's Academy of Sisters v. Soloman, 77 Colo. 463, 238 P. 22, 42 A.L.R. 964 (1925).

It has been stated that the trust fund should not be depleted because of the torts or breaches of trust of the trustees.[9] However, courts following the trust fund doctrine have allowed recovery to injured patients when the hospital carried indemnity insurance or had other property out of which a judgment against the hospital could be satisfied.[10] In these cases it was reasoned that the trust fund would not be depleted by the judgment obtained against the charity.

This doctrine has been repudiated by the English courts[11] and disapproved in some American jurisdictions which accepted it originally.[12] However, despite the fact that the trust fund theory has been subjected to strong criticisms[13] and is considered to be in disrepute by some courts,[14] it is still followed in many jurisdictions,[15] including Mississippi.[16]

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[9]*Ibid.*

[10]O'Conner v. Boulder, Colo. Sanitarium Assn.; 105 Colo. 259, 96 P.(2d) 835, 133 A.L.R. 819 (1939); Vanderbilt University v. Henderson, 23 Tenn. App. 135, 127 S.W. 284 (1938). However, in a Mississippi case it was stated that a charitable hospital was not liable despite the fact that indemnity insurance was carried by such hospital. Miss. Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930).

[11]Mersey Docks v. Gibbs, 11 H.L.C. 686 (Eng. 1866); Lavere v. Smith's Falls Public Hospital, 25 Ont. L.Rep. 98, 26 D.L.R. 346, 9 B.R.C. 13 (1915).

[12]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912); Michigan Bruce v. Cent. Methodist Church, 147 Mich. 230, 110 N.W. 951, 10 L.R.A.(NS) 74 (1907.)

[13]It was said that the purity of the charitable hospital's aims may not justify its torts in Powers v. Mass. Homeopathic Hospital, 109 F. 294, 65 L.R.A. 372 (CCA, 1st 1901). In answer to the argument that on grounds of expediency the trust fund of a charity should not be depleted because of the torts of its servants it was stated that such argument should be addressed to the legislature, not to the courts. Bruce v. Central Methodist Church, 147 Mich. 230, 110 N.W. 951, 10 L.R.A.(NS) 74 (1907). An individual in doing a charitable act is responsible for his conduct which inflicts injury upon others, notwithstanding the benevolent purposes of his act. This same rule should logically apply to a trust set up for charity. Love v. Nashville Agri. Inst., 146 Tenn. 550, 243 S.W. 304, 23 A.L.R. 887 (1922). "It is true that an action does not lie against a trustee under a will, or the like, as such, for his torts or those of his servants in the affairs or administration of a trust. He has to be sued individually; but the reason is purely technical, and the courts allow the judgment against him individually for damages to be paid out of the trust funds. No rule therefore that trust funds may not be used to pay damages for torts in the administration of the trust exists even in the case of ordinary express trusts, let alone in the general trusts of charitable corporations." Kellogg v. Church Charity Foundation, 128 App.Div. 214, 217, 112 N.Y.Supp. 566, 569 (1908).

[14]Tucker v. Mobile Infirmary Ass'n, 191 Ala. 572, 68 So. 4 (1915); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A.L.R. 809 (1940); Powers v. Mass. Homeopathic Hosp., 109 F. 294, 47 C.C.A. 122, 65 L.R.A. 372; Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912).

[15]Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N.E. 392, 14 A.L.R. 563 (1920); St. Mary's Academy of Sisters v. Soloman, 77 Colo. 463, 238 P. 22, 42 A.L.R. 964 (1925); McCleod v. St. Thomas Hospital, 170 Tenn. 423, 95 S.W.2d 917 (1936); Nicholas v. Evangelical Deaconess Home and Hospital, 281 Mo. 182, 219 S.W. 643 (1920).

[16]Eastman Gardner Co. v. Parmenter, 111 Miss. 813, 72 So. 234 (1916); Miss. Baptist Hosp. v. Moore, 156 Miss. 676, 126 So. 465 (1930).

Public Policy Theory: A second theory, closely allied to the trust fund doctrine, is that immunity of charitable hospitals from liability is based on public policy.[17] To allow the assets of a charitable hospital to be dissipated in damage suits would discourage donors and would result in the destruction of charities to the detriment of the public welfare.[18] Accordingly it has been said that it is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity.[19] Some courts take the position that charitable hospitals perform public functions and like other public bodies should be exempt from liability for the torts of servants.[20] But this theory of immunity, like the trust fund doctrine, has been criticized as unsound and rejected in a number of cases.[21]

Implied Waiver Theory: A third theory used in exempting a charitable hospital from liability for the torts of its servants is the doctrine of implied waiver. This theory became prominent in a federal case,[22] wherein it was said: "One who accepts the benefit either of a public or private charity enters into a relation which exempts his benefactor from liability for the negligence of his servants in administering the charity."[23] This reasoning was subsequently followed in a leading New York case[24] and in other jurisdictions.[25] However, the fictitious logic on which the implied waiver theory is based has been harshly condemned by some courts.[26]

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[17]Cook v. Norton Memorial Infirmary, 180 Ky. 331, 202 S.W. 874 (1918); Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N.E. 287, 23 A.L.R. 900 (1922); Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785, 23 A.L.R. 907 (1921).

[18]Jensen v. Maine Eye and Ear Infirmary, 107 Me. 408, 78 A. 898, 33 L.R.A.(NS) 141 (1910); Duncan v. Nebraska Sanitarium and Benevolent Assn., 92 Neb. 162, 137 N.W. 1120, 41 L.R.A.(NS) 973 (1912).

[19]Magnuson v. Swedish Hospital, 99 Wash. 399, 169 P. 828 (1918); Vermillion v. Woman's College, 104 S.C. 197, 88 S.E. 649 (1916).

[20]Morrison v. Henke, 165 Wis. 166, 160 N.W. 173 (1916); Schumacher v. Evangelical Deaconess Soc., 218 Wis. 169, 260 N.W. 476 (1935).

[21]McIrney v. St. Luke's Hospital Ass'n., 122 Minn. 10, 141 N.W. 837, 46 L.R.A.(NS) 548 (1913); In the case of Glavin v. Rhode Island Hosp., 312 R.I. 411, 34 Am.Rep. 675 (1879), it was said that if public policy required that charitable hospitals be excluded from tort liability for the acts of its servants, it should be so declared by the legislature and not by the dictum of the courts. Hewett v. Woman's Hosp. Aid Ass'n. 73 N.H. 556, 64 A. 190 (1906).

[22]Powers v. Mass. Homeopathic Hosp., 109 F. 294, 47 C.C.A. 122, 65 L.R.A. 372 (1901).

[23]*Id.* at page 303 F., 380 L.R.A.

[24]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912).

[25]Burdell v. St. Luke's Hospital, 27 Cal.App. 310, 173 P. 1008 (1918); Pepke v. Grace Hospital, 130 Mich. 493, 90 N.W. 278 (1902).

[26]Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28, 109 A.L.R. 1197 (1937); Gamble v. Vanderbilt University, 138 Tenn. 616, 200 S.W. 510, L.R.A. 1918C 825 (1917). In this case the court said that it was

Respondeat Superior Inapplicable to Charitable Hospitals: A few courts take the position that the doctrine of *respondeat superior* does not apply to a charitable hospital; thus it is not liable for the torts of its servants.[27] Actually the reasoning used by courts adhering to this theory is identical in many cases to the reasoning in support of other theories so far discussed. The rationale of this doctrine has been expressed in the following forms.

1. Since the charitable hospital derives no benefit from the acts of its servants in the sense of personal and private gain, which is the real reason for the rule of *respondeat superior,* it should not be liable for the torts of such servants.[28]

2. The doctrine of *respondeat superior* is founded on considerations of public policy. However, there are circumstances under which public policy dictates that that rule be limited. The interest of the public in the protection of charitable hospitals from liability for the torts of servants is such a circumstance.[29]

3. As a corollary to the trust fund doctrine, it is stated that if the trust may not be dissipated to compensate for the injuries done to others by the servants of the charity, then the charity is not made to answer for the torts of such servants, and the doctrine of *respondeat superior* has no application.[30]

This theory, like the other non-liability theories thus far discussed, has been rejected as unsound by some courts.[31]

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impossible to apply the doctrine when patients came to the hospital unconscious or in a demented condition, or in cases where children too young to understand the meaning of a contract were admitted as patients. See also, Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915).

[27]Hearnes v. Waterbury Hospital, 66 Conn. 98, 33 A. 595, 31 L.R.A. 224 (1895); Shau v. Morgan, 241 Wis. 334, 6 N.W.2d 212 (1942); Taylor v. Protestant Hospital Ass'n., 85 Ohio St. 90, 96 N.E. 1980, 39 L.R.A.(NS) 429 (1911).

[28]Hearnes v. Waterbury Hospital, 66 Conn. 98, 33 A. 595, 31 L.R.A. 224 (1895); Taylor v. Protestant Hosp. Ass'n., 85 Ohio St. 90, 96 N.E. 1089, 39 L.R.A.(NS) 429 (1911).

[29]Southern Methodist Hospital v. Wilson, 45 Ariz. 507, 46 P.2d 118 (1935).

[30]Union P.R. Co. v. Artist, 60 F. 365, 19 U.S.App. 612 (CCA 8th, 1894).

[31]Hillyer v. St. Bartholomew's Hospital, 2 K.B. 820, 9 B.R.C. 1 (Eng. 1909); Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.(2d) 28 (1937); Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915). In the last case quoted it was said that the rule of *respondeat superior* is not dependent on whether the master makes a profit by the discharge of the duties of the servant. And see Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 347, 133 A.L.R. 809, 814, where it was said: "If the employees are not servants of the hospital corporation or organization, the doctrine of respondeat superior would of course have no application, and there would be no liability for injuries to strangers, or anyone else. Whether or not such employees of the hospital are servants of the hospital is dependent on the nature of the duties and obligations assumed by the hospital, in furtherance of which its

Exception to the General Rule

There is one important exception to the general rule which is recognized in most jurisdictions following the majority view. This exception is that a charitable hospital may be liable to patients who suffer injury through the negligence of its servants if the hospital has been negligent in hiring such servants,[32] or if the hospital has been negligent in retaining such servants in its employ.[33] The term *servant* may be extended in cases involving this exception to include physicians and nurses,[34] who are usually considered in the category of independent contractors in their relation to a hospital.[35]

Logically the courts following the trust fund theory should not recognize the exception, for liability for negligence in selecting servants may impair the integrity of the trust estate just the same as liability for the negligence of servants.[36] But some courts which profess to follow the trust fund theory do recognize the exception,[37] which fact is considered to have weakened the trust fund rule.[38]

The reasoning behind the exception to the general rule was well-stated by the West Virginia court:

> When administered by incompetent servants, charity, instead of being a great boon to humanity, may become a menace. One who enters a hospital expects, and has a right to expect, more skillful

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servants are employed, and not upon the nature of the hospital itself, whether eleemosynary or otherwise."

[32]Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Burdell v. St. Luke's Hospital, 37 Cal.App. 310, 173 P. 1008 (1918); St. Vincent's Hospital v. Stine, 195 Ind. 350, 144 N.E. 537, 33 A.L.R. 1361 (1924).

[33]Roberts v. Ohio Valley General Hospital, 98 W.Va. 476, 127 S.E. 318, 42 A.L.R. 968 (1925).

[34]Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Taylor v. Deaconess Home and Hospital, 104 Ohio St. 61, 135 N.E. 287, 23 A.L.R. 900 (1922); Weston v. Hospital of St. Vincent, 131 Va. 587, 107 S.E. 785, 23 A.L.R. 907 (1921).

[35]See 19 A.L.R. 1183; Arkansas Midland R. Co. v. Pearson, 98 Ark. 399, 135 S.W. 917 (1911); Quinn v. Kansas City, M.&B.R. Co., 94 Tenn. 713, 30 S.W. 1036, 28 L.R.A. 552 (1895). The question of the extent of a master's liability, under the doctrine of *respondeat superior,* for the torts of physicians employed by him is beyond the scope of this note. *Cf.* Knox v. Ingalls Shipbuilding Corp., 158 F.(2d) 973 (C.C.A. 5th, 1947).

[36]Roosen v. Peter Bent Brigham Hospital, 235 Mass. 66, 126 N.E. 392, 14 A.L.R. 563 (1920); St. Mary's Academy of Sisters v. Soloman, 77 Colo. 463, 238 P. 22, 42 A.L.R. 964 (1925).

[37]Mississippi Baptist Hospital v. Moore, 156 Miss. 676, 126 So. 465 (1930); Georgia Baptist Hospital v. Smith, 37 Ga.App. 92, 139 S.E. 101 (1927); Tribble v. Missionary Sisters of S.H., 137 Wash. 326, 242 P. 372 (1926).

[38]Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A.L.R. 809 (1940); Hospital of St. Vincent v. Thompson, 116 Va. 101, 81 S.E. 13, 51 L.R.A.(NS) 1025 (1914).

treatment than is obtainable in the home. If such institutions be not held to reasonable care in the selection of their employees, confidence in their efficacy will be shaken. Many who need, will fear to accept, hospital treatment, and those who do apply therefor will lack the faith therein that is so frequently half the battle in the contest with disease.[39]

Corporate Liability Theory

A small number of jurisdictions have adopted a corporate liability theory under which a charitable hospital is liable for the torts of its servants on the same basis that any other corporation is held liable. Whether the party causing the injury to the patient is a servant or not should be determined through application of agency principles. A doctor employed by a charitable hospital is usually considered as an independent contractor rather than a servant, so the charity is not liable for his acts of negligence,[40] and it makes no difference whether the doctor is a visiting or resident physician.[41] Nurses, when working under the control of doctors, are likewise generally considered independent contractors rather than servants of the hospital.[42] But a nurse working on the staff of a charitable hospital may be considered as a servant when engaged in routine duties.[43]

The corporate liability theory seems to have originated in the case of *Glavin v. Rhode Island Hospital*,[44] in which case the court said:

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[39]Roberts v. Ohio Valley Gen. Hospital, 98 W.Va. 476, 127 S.E. 318, 320, 42 A.L.R. 968, 970 (1925).

[40]Glavin v. Rhode Island Hospital, 12 R.I. 411, 34 Am.Rep. 675 (1879); In Hillyer v. St. Bartholomew's Hospital, 2 K.B. 820, 9 B.R.C. 1 (Eng. 1909) it was said that the physician was the servant of the patient rather than the servant of the hospital. Schloendorff v. New York Hospital Society. 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912); Taylor v. Flower Deaconess Home and Hospital, 104 Ohio St. 61, 135 N.E. 287, 23 A.L.R. 900 (1922).

[41]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912).

[42]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912); "The hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendance of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine; and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants." Hillyer v. St. Bartholomew's Hospital, 2 K.B. 820, 829, 9 B.R.C. 1, 11 (Eng. 1909).

[43]Schloendorff v. Society of New York Hospital, 211 N.Y. 125, 105 N.E. 92, 52 L.R.A.(NS) 505 (1912); Lavere v. Smith's Falls Public Hospital, 35 Ont. L.Rep. 98, 9 B.R.C. 13 (1915); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A.L.R. 809 (1940).

[44]12 R.I. 411, 34 Am.Rep. 675 (1879).

> Where there is a duty, there is prima facie, at least, liability for its neglect; when a corporation or quasi-corporation is created for certain purposes which cannot be executed without the exercise of care and skill, it becomes the duty of the corporation or quasi-corporation to exercise such care and skill; and the fact that it acts gratuitously, and has no property of its own in which it is beneficially interested, will not exempt it from liability for any neglect of the duty, if it has funds for the purposes of its creation which can be applied to the satisfaction of any judgment for damages recovered against it.[45]

The decision in the *Glavin* case was nullified in Rhode Island a short time after it was reached when the legislature passed a law exempting charitable hospitals from liability in such cases.[46] Nevertheless, that decision has been followed in a leading Alabama case[47] and in several other jurisdictions,[48] and at least three courts have rejected one or another of the non-liability views in favor of the corporate liability theory in the past decade.[49] Many legal writers also take a position favoring this theory.[50]

It is to be noted that in the cases following this view, the actions were brought by paying patients and in some of the cases, liability seems to have been predicated on a contract between the patient and hospital;[51] for this reason, the corporate liability theory has been re-

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[45]Glavin v. Rhode Island Hospital, 12 R.I. 411, 34 Am.Rep. 675, 684 (1879).

[46]General Laws of Rhode Island, 1896, page 538.

[47]Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915).

[48]Lavere v. Smith's Falls Public Hospital, 25 Ont.L.Rep. 98, 9 B.R.C. 13 (1915); City of Shawnee v. Roush, 101 Okla. 60, 223 P. 354 (1923); Mulliner v. Evangelischer Dakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A.L.R. 809 (1940). And see also President and Directors of Georgetown University v. Hughes, 130 F.2d 810 (D.C. 1942).

[49]*New York*—Sheehan v. North Country Community Hospital, 273 N.Y. 163, 7 N.E.2d 28, 109 A.L.R. 1197 (1937); *California*—Silva v. Providence Hospital of Oakland, 14 Cal.2d 762, 97 P.2d 798 (1939); *New Hampshire*—Welsh v. Frisbie Memorial Hospital, 90 N.H. 337, 9 A.2d 761 (1939).

[50]See editorial note, 14 A.L.R. 572; 10 American Jurisprudence 687; "While it is doubtless true that charities are to be encouraged and that public policy justifies their protection even at some social disadvantage, there is also an element of social policy in preventing loss of earning power and property in the case of single individuals and families. If beneficiaries and servants of charities, and third persons, are killed or injured, or their property injured or destroyed, and no recompense is given from any source, the result is apt to be that a certain number of persons will become public charges and a feeling of social injustice will be implanted in the minds of the victims." 2 BOGERT, TRUSTS AND TRUSTEES 1244.

[51]Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915); Lavere v. Smith's Falls Public Hospital, 35 Ont.L.Rep. 98, 9 B.R.C.; 13 (1915); Glavin v. Rhode Island Hospital, 12 R.I. 411, 34 Am.Rep. 675 (1879); Mulliner v. Evangelischer Dakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920).

ferred to as the "contract" theory.[52] Thus, in the case of *Lavere v. Smith's Falls Public Hospital*,[53] it was stated that a hospital which had contracted to supply the attendance incident to the renting of a room was liable for the negligence of its servants in supplying such attendance. Is it necessary that the patient be a paying one to avail himself of the corporate liability or contract theory? The language of several cases would indicate an affirmative answer to this question,[54] but other cases state that it makes no difference whether the patient pays or not.[55]

Conclusion

The law on this particular subject has undergone considerable development since the decision of the *Heriot* case almost a hundred years ago. The early view promulgated in that case, that a charitable hospital was absolutely immune from liability for the torts of servants under the trust fund theory, has been abandoned by the court which advanced the rule and by other jurisdictions. The generally accepted exception to the majority view seems to be a step toward placing charitable hospitals on the same plane with other corporations as to liability for the torts of servants. And the corporate liability theory, though a minority view, is gaining a greater acceptance in American jurisprudence.

In the fairly recent case of *Nicholson v. Good Samaritan Hospital*,[56] it was said:

> At the outset it was conceded that the numerical weight of authority was against holding charitable institutions liable for the torts of their servants in injuring patients, but since the Alabama decision[57] above referred to, the modern trend appears to have been to enforce liability. Courts holding with the numerical weight of authority in recent years have done so "reluctantly," considering themselves bound by precedent . . . except in jurisdictions thoroughly committed to some particular theory, the later cases tend to discard entirely all theory of special privilege, and decide the question of liability

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[52]Lavere v. Smith's Falls Public Hospital, 35 Ont.L.Rep. 98, 9 B.R.C. 13 (1915); Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915).

[53]35 Ont.L.Rep. 98, 9 B.R.C. 13 (1915).

[54]Lavere v. Smith's Falls Public Hospital, 35 Ont.L.Rep. 98, 9 B.R.C. 13 (1915); Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915).

[55]Mulliner v. Evangelischer Dakonniessenverein, 144 Minn. 392, 175 N.W. 699 (1920); Nicholson v. Good Samaritan Hospital, 145 Fla. 360, 199 So. 344, 133 A.L.R. 809 (1940).

[56]145 Fla. 360, 199 So. 344, 133 A.L.R. 809 (1940).

[57]Tucker v. Mobile Infirmary Ass'n., 191 Ala. 572, 68 So. 4, L.R.A. 1915D, 1167 (1915).

solely upon the relation between the parties, applying the rules applicable generally in cases of torts.[58]

As indicated by the above quotation, it appears that there is a definite trend toward holding charitable hospitals liable for the torts of servants on the same basis that other corporations are held liable.

Charles C. Jacobs, Jr.

SUSPENSION OF IMPOSITION OF SENTENCE

County Judge Haralson at Hattiesburg, Mississippi, brought to the attention of the legal profession and the general public a somewhat unusual method of punitive jurisprudence when he gave a defendant the choice of supporting ten orphaned children or of going to prison for from two to twenty years. The defendant had been convicted of manslaughter after his automobile killed the children's father.

The disposition of the *Sherrill* case[1] caught the public interest. A considerable amount of publicity was given to the "natural justice" exacted by Judge William Haralson,[2] and for the moment there was much discussion as to the merits of this method of meting out justice. The case revealed clearly that legislative provisions in Mississippi on this subject were inadequate; that specific boundaries and rules in dealing with similar situations should be formulated. In the *Sherrill* case the defendant chose to contribute to the support of the children of the deceased in lieu of receiving the statutory punishment. Judge Haralson then suspended the imposition of sentence and entered the following order: "It is hereby ordered that this case be and the same is hereby continued to the next term of court for the purpose of passing sentence upon the defendant." The only record as to the disposition of the case is that in each term of court the case is passed to be sentenced at a later date. The procedure is at best extremely awkward.

The Inherent Right of the Judiciary to Suspend Imposition of Sentence

Judge Haralson merely exercised the authority of the court to suspend[3] the imposition of sentence on condition. The inherent right of

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[58]Nicholson v. Good Samaritan Hospital, 145 Fla. 566, 199 So. 344, 350, 133 A.L.R. 809, 818 (1940).

[1]W. H. Sherrill had been indicted on a charge of manslaughter, but as sentence has never been pronounced there is no report as to the disposition of the case.

[2]County Judge, Forrest County, Hattiesburg, Mississippi.

[3]Although the term "suspend sentence" is sometimes used indiscriminately in referring both to imposition and to execution of sentence, it properly refers to the suspension of the imposition of sentence. Unless otherwise designated, the words

the judiciary to suspend imposition of sentence *temporarily* has never been seriously challenged.[4] The origin of this right can be traced to the procedure in the early court system in England. A person on trial as to his guilt or innocence was not permitted to introduce any witness to prove himself innocent or in mitigation of the punishment. From such conditions the plea of "benefit of clergy"[5] arose. Later the courts which tried cases, after the verdict but before the assessment of the punishment by sentence, would permit the defendant to introduce testimony in mitigation of the punishment. There developed the custom of suspending the sentence until the evidence was heard under this plea so that the court might have the benefit of it in arriving at the punishment it would assess.[6] The common law right of courts in this country to suspend sentences for limited periods of time can be traced to this origin.

However, the prevailing rule in a majority of American jurisdictions is that without enabling legislation there is no inherent right to suspend indefinitely the imposition of sentence.[7] This position is strongly supported by the historical background of the practice of suspending sentences. The majority view is predicated on two major premises: (1) to

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will be employed in their strict meaning when used in this note. The majority of courts have not attempted to differentiate between the effects of their application. A few courts, however, have declared that while the court may exercise the right to suspend the imposition of sentence it may not suspend the execution of sentence. Huggins v. Caldwell, 223 Ky. 468, 3 S.W.2d 1101 (1928). In Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029, 1034 (1941), the court stated: "There is a material difference in the status of a defendant following the verdict of guilt and his status after a final judgment has been entered and sentence pronounced . . ."

[4]Commonwealth v. Morgan, 278 Pa. 395, 123 A. 337 (1924); Richardson v. Commonwealth, 131 Va. 802, 109 S.E. 430 (1921). For the rule as stated by the Mississippi Supreme Court, see Fuller v. State, 57 So. 6, 39 L.R.A.(N.S.) 242, *mod. on sugg. error* 100 Miss. 811, 57 So. 806 (1912). The prevailing view, as cogently expressed in State v. Sapp, 87 Kan. 740, 125 P. 78, 79 (1912), is: "A court may postpone the rendition of judgment in a criminal case, and has a practically unlimited discretion in that regard, so long as the imposition of a sentence as a matter of course at some time remains in contemplation. As to this, there is no conflict in the authorities." See also 24 C.J.S. 27, § 1564.

[5]This right was first claimed by the officials of the church alone, who maintained that they had the right to be tried in the ecclesiastical court. Later the plea was permitted to all persons eligible to clerk or other position in the church, which privilege embraced all men who could write; it was finally broadened to apply to all persons charged with crime . When granted the "benefit of clergy," persons adjudged guilty of crime were first allowed in the ecclesiastical court to expurgate themselves, or prove their innocence and offer evidence in mitigation. *Ex parte* Hart, 29 N.D. 38, 149 N.W. 568 (1914); Snodgrass v. State, 67 Tex.Cr.R. 648, 150 S.W. 178 (1912).

[6]*Ex parte* Hart, 29 N.D. 38, 149 N.W. 568 (1914); Snodgrass v. State, 67 Tex.Cr.R. 648, 150 S.W. 178 (1912).

[7]*Ex parte* Acosta, 149 P.2d 757 (Cal. 1944); *Ex parte Fisher*, 95 W.Va. 397, 121 S.E. 287 (1924); Fuller v. State, 57 So. 6, 39 L.R.A.(N.S.) 242, *mod. on sugg. error* 100 Miss. 811, 57 So. 806 (1912); Hancock v. Rogers, 140 Ga. 688, 79 S.E. 558 (1913); People v. Brown, 54 Mich. 15, 19 N.W. 571 (1884); *Ex parte* United States, 242 U.S. 27 (1916). *See* Notes, 26 A.L.R. 399 (1923).

allow such a power would place the criminal at the caprice and whim of the judge who may or may not possess the ability and integrity to employ such wide discretion wisely;[8] (2) such authority in the courts cannot be reconciled with our system of government. The argument in regard to the latter premise is that the power of suspension is equivalent to a pardon, or at least a grant of power to the court to judge whether or not a duly convicted criminal should be punished. The duty of the judiciary is to impose the punishment for crime which is fixed by the legislature. It is not the act of the court, but the judgment of the law which the court is commanded to pronounce.[9]

The contrary view has been followed by a respectable minority of courts,[10] which have recognized the power of indefinite suspension as an inherent prerogative of the judiciary.

The first reported Mississippi case to involve the right of the judiciary to suspend the imposition or execution of sentence was *Gibson v. State,*[11] adjudicated in 1890. Having been indicted for the unlawful sale of intoxicating liquors, Gibson appeared before the Circuit Court of Warren County and pleaded guilty. The court entered judgment against him for costs but suspended the judgment as to the fine. At the next term, on a motion of the district attorney, the court sentenced the defendant to pay a fine. The opinion of the court was that no wrong was done to Gibson by pronouncing sentence at a future term. The court gave no indication that it was cognizant that the matter of indefinite suspension of sentences was a controversial question.

In 1912 the Mississippi Supreme Court held that the judiciary without statutory authority does not have the power to suspend indefinitely either the execution or the imposition of sentences. Considering the appeal from a group of cases involving parties who had pleaded guilty to violating the prohibition statutes, the court *initially* concluded that where a court has the power to award an execution it may grant a suspension of its own sentences.[12] But on suggestion of error the court reconsidered the basis for its prior decision and determined that all the cases used in support of the original holding were either not in point or

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[8]People v. Barrett, 202 Ill. 287, 67 N.E. 23, 24 (1900).

[9]*Ex parte* Fisher, 95 W.Va. 397, 121 S.E. 287 (1924).

[10]Tuttle v. Long, 100 Me. 123, 60 A. 892 (1905); Welch v. State, 120 Me. 294, 113 A. 737, 738 (1921); Marks v. Westworth, 199 Mass. 44, 85 N.E. 81 (1908); State v. Ray, 212 N.C. 748, 194 S.E. 472, 473 (1938).

[11]68 Miss. 241, 8 So. 329 (1890).

[12]Fuller v. State, 57 So. 6, 39 L.R.A.(N.S.) 242, *mod. sug. error* 100 Miss. 811, 57 So. 806 (1912). See also Allen v. State, 57 So. 9 (Miss. 1912); Hoggett v. State, 57 So. 9 (Miss. 1912); Howard v. State, 57 So. 9 (1912).

were decided upon a misconception of the inherent powers of a court and the common law rule on this particular point. The ultimate conclusion was that the judiciary has no power at all to suspend the execution of a sentence during the good behavior of the defendant.[13] The same result was applied with equal force to the power of the court to suspend indefinitely the imposition of a sentence after a plea or verdict of guilty.[14] The Mississippi court in dicta conceded that as a policy perhaps the court should possess such power.

Statutory Provisions for Suspension of the Imposition or Execution of Sentence

To understand the reaction of the Mississippi Supreme Court toward legislative attempts in this field, Section 124 of the Mississippi Constitution of 1890 should be examined:

> In all criminal and penal cases, excepting those of treason and impeachment, the governor shall have the power to grant reprieves and pardons, to remit fines, and in case of forfeiture, to stay the collection until the end of the next session of the legislature, and by and with the consent of the Senate to remit forfeitures.[15]

The language of this section is explicit in conferring the right of pardon on the executive department.[16]

An early statute which was challenged as violative of this provision was an act which permitted the board of supervisors after thirty days from the date of sentence to discharge a convict who because of apparently permanent bodily infirmity might be unable to labor.[17] The Mississippi Supreme Court held that this statute invaded the exclusive pardoning power of the governor.[18]

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[13]Fuller v. State, 57 So. 6, 39 L.R.A.(N.S.) 242, *mod. sugg. error* 100 Miss. 811, 819, 820, 57 So. 806, 808 (1912.)

[14]Hoggett v. State, 57 So. 6, *mod. sugg. error* 57 So. 811 (Miss. 1912).

[15]Miss. Const. § 124 (1890).

[16]"But where the pardoning power is conferred on the executive without express or implied limitations, the grant is exclusive, and the legislature can neither exercise such power itself nor delegate it elsewhere . . ." 12 C.J. 838, § 322. See Montgomery v. State, 231 Ala. 1, 163 So. 365, 368 (1935).

[17]Acts of 1906, Chapter 109, § 3: "If any convict, when he otherwise ought to be put to work, should be unable to labor from bodily infirmity apparently permanent, the board of supervisors may discharge him from the jail after the expiration of thirty days from the date of sentence. But in no case shall a convict be discharged, unless there be produced to the board a certificate of the sheriff, a physician, and another reputable person as to such infirmity, and the sheriff shall make the fine, costs, and jail fees out of the property and effects of the convict, if he have any."

[18]State v. Kirby, 96 Miss. 629, 630, 631, 51 So. 811, 812 (1910).

Several years later the Mississippi legislature passed the following measure: "The circuit courts, in misdemeanor cases, are hereby authorized to suspend a sentence, and to suspend the execution of a sentence, or any part thereof, on such terms as may be imposed by the judge of the court."[19] The first reported case to arise under this act was *City of Hattiesburg v. Washington*,[20] decided in 1924.[21] The constitutionality of the statute was not challenged, and the court did not consider this problem because the statute was not applicable to the facts presented for adjudication.[22] In the succeeding twenty-two years only five cases in which this statute was involved as a primary issue reached the state Supreme Court.[23] In only one of these, *White v. State*,[24] was the validity of the statute questioned by the parties to the litigation. In this case the court held that there was no authority for a circuit judge *in vacation*

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[19]Miss. Code Ann. § 2541 (1942).

[20]136 Miss. 322, 101 So. 484 (1924).

[21]An analysis of the operation of such a statute reveals immediately why there is so little litigation in our appellate courts on the question. Only on very rare occasions would the judge exercise this discretion, and then only if it were agreeable to both the State and the defendant. Certainly to the defendant a suspension of sentence would hardly be objectionable, unless the conditions thereof were more obnoxious than serving a jail sentence—a most improbable situation. The only time at which the issue might arise is on breach of the conditions and appeal to the Supreme Court from the order of commitment.

[22]"In the decision of this case it will be unnecessary to pass upon the validity of the order of the police justice attempting to amend or correct the original judgment as it appears on the minutes of the court . . . still he [the police justice] was wholly without power to suspend the sentence or any part thereof, and that part of the judgment which directed that 'the jail sentence be suspended during the good behavior of the defendant' was void . . . [The court then quotes § 2541 of Miss. Code Ann. (1942)]. But the Legislature has not attempted to confer such power of a police justice or police court." City of Hattiesburg v. Washington, 136 Miss. 322, 328, 101 So. 484, 485 (1924).

[23]*Bolton v. State,* 166 Miss. 290, 146 So. 453 (1933), in which Bolton had been convicted of violation of liquor laws and sentence had been suspended. In regard to the contention that the suspension of sentence statute only authorized the suspension of sentence for a definite period, the court held that it would not be necessary to decide this question, for if the suspension of sentence were void, then it could have been treated as a nullity, and the appellant at all times subject to its execution. *McLemore v. State,* 170 Miss. 641, 155 So. 415 (1934), in which the appellant had been convicted of the unlawful possession of intoxicating liquor and his sentence had been suspended. Neither the inherent right of the court nor the suspension of sentence statute was considered in the opinion of the court. The court stated that it doubled that there was any appeal from an order or judgment or such a character, as it was not an appeal from the final judgment of conviction and as the time had long since expired for any such appeal. In *Cooper v. State,* 175 Miss. 718, 168 So. 53 (1936) this dictum was enlarged upon, but again the subject of the constitutionality of the suspension of sentence statute was not considered. *Dickerson v. State,* 150 Miss. 823, 117 So. 261 (1928), in which the court rendered no additional interpretation of the statute. *White v. State,* 185 Miss. 307, 188 So. 8 (1939), in which the appellant in his brief relied heavily on the decision of the Alabama court in *Montgomery v. State,* 231 Ala. 1, 163 So. 365 (1935), declaring a similar statute unconstitutional. The Mississippi court was able to dispose of the appeal without deciding the constitutional issue.

[24]185 Miss. 307, 188 So. 8 (1939).

to impose a sentence that had been suspended pursuant to the legislative authorization. The constitutional issue was dismissed because there were other grounds on which to dispose of the case.

A Mississippi statute, providing for the suspension of sentence in cases of conviction for desertion,[25] was declared unconstitutional by an evenly divided court in 1926.[26] The controlling opinion considered the indefinite suspension of sentence only in the light of its being a conditional pardon. Such a narrow construction of the power of suspension of sentence furnished the major premise for the dissent by Chief Justice Smith.[27]

In the case of *Gabriel v. Brame*,[28] however, the right of the legislature to grant to the judiciary authority to suspend indefinitely the execution of sentence was sustained. Gabriel had pleaded guilty to a charge of willful trespass. The court imposed the maximum penalty under the statute but suspended all of it except ninety days in jail; the condition of the suspension was that the convict would not violate the law in the future. The effect of such a judgment would appear to be a judicial commutation of sentence on condition. After his release Gabriel had been guilty of burglary, and the court was requested to revoke the suspension and to require the remainder of the sentence as imposed to be put into execution. The appellant questioned the constitutionality of the suspension of sentence statute in a petition for a writ of habeas corpus after his reincarceration. The court rejected his contention on several grounds. First, the court stated that the authority to say what is a crime, and what punishment shall be imposed, is in its entirety a

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[25]Laws of 1924, Chapter 155. This act declared wife desertion to be a felony and provided for punishment in case of conviction. § 3 read as follows: "In case of an indictment and at the trial on the entry of a plea of guilty or after conviction the court may in imposing the fine or imprisonment as provided for in Section 1 of this act, suspend the same or any part thereof, upon the defendant entering into and executing a good and solvent bond . . . conditioned that such defendant will provide for the support and maintenance of his wife and child or children as the case may be for a period of two years."

[26]State v. Jackson, 143 Miss. 745, 109 So. 724 (1926).

[27]"The exemption from fine or imprisonment conferred by the third section of this statute is not of grace nor at the discretion of the court, but is a right to which a person convicted of violating the statute is absolutely entitled on compliance by him with the conditions imposed therefor by the statute. Moreover, the guilt and the conviction of the convict remain in effect with all of the consequences that flow therefrom, except liability to fine or imprisonment thereunder; and, where such is the effect of a statute, the courts generally hold that it does not encroach on the pardoning power . . .

The statute does not attempt to and could not take away from the governor his power to pardon for convictions under it, and such power, of course, remains in full force and effect . . ." *Id.* at 756, 109 So. at 726.

[28]28 So.2d 581 (Miss. 1947). *Cf.* Lovelace v. Commonwealth, 285 Ky. 326, 147 S.W.2d 1029 (1941).

legislative question. Thus the lawmaking body may prescribe not only the penalty, but also such incidents and conditions as will best serve the general policy which forms the basis for all criminal sentences. On this predicate the court concluded the argument as follows:

> . . . it will not be denied that it is within the legislative authority to provide that, in all except non-bailable cases, the court shall not be obliged to impose any sentence at all at the term during which the verdict or plea of guilty is pronounced, but . . . may continue the case to the next succeeding term and thence from term to term, *sentence to be imposed at any later term to which the case has been continued for that purpose,* at which later term the court may inquire into the conduct of the convict since the date of his conviction in order to furnish light as to the proper sentence to be imposed. [All italics added][29]

On such generalities there can be no dispute, for when the words are stripped down to their bare meaning the legislature would be merely granting the court an inherent right which the judiciary already possesses. As has been previously discussed, the court may suspend the sentence from term to term to ascertain the proper punishment that will *ultimately* be imposed. However, this rule is basically different from a declaration that the court may be given authority to suspend a sentence from term to term indefinitely with the possibility that sentence may never be invoked.

The court stated further in the *Gabriel* case that Section 2541 is a condition or incident to what punishment shall be inflicted, and that the court was in accord with the majority rule in this country which sustains the constitutionality of such laws. It criticized the reasoning in *State v. Jackson*[30] and other cases supporting the minority view as failing to differentiate between the situations involving suspension of sentence while the court still retains jurisdiction and those where the action is taken *after* the court has relinquished its jurisdiction.

The final reason given by the court for sustaining the constitutionality of the statute rests on the following argument:

> Where there has been a long series of uniform decisions, asserting the same principle, and reaching the same conclusion upon facts which are alike, and where a point now lately made was as much involved, the fact that the point has not been

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[29]Gabriel v. Brame, 28 So.2d 581, 583 (Miss. 1947).
[30]143 Miss. 745, 109 So. 724 (1926).

> raised in any of these cases by counsel or stated by the court is strong support that it is now made without grounds.[31]

The long series of uniform decisions numbered six appellate cases. It is questionable if this doctrine is properly applicable in this situation which involves a constitutional question, on which the general rule of construction is that the court will not consider the constitutionality of the statute involved unless that issue is raised by one of the parties and the case cannot be decided on other grounds.

When the trial court acts beyond its power in suspending a sentence on condition that the defendant not violate the law, and the defendant violates the condition, the majority rule is that the defendant will not be released. The fact that the statutory period of imprisonment for that particular offense has expired is immaterial.[32] Such a holding is predicated on the ground that since the original order is void, the court never loses authority to impose the proper sentence. The decisions in Mississippi have been in accord with the weight of authority on this point.[33] If John Doe, a resident of Mississippi, charged with violating the desertion statute,[34] pleaded guilty and the trial court suspended sentence on condition that for five years the defendant would contribute to the support of his children, the order would be invalid because the crime of desertion has been declared to be a felony, and the right to suspend sentence in Mississippi is confined to cases of misdemeanors. Three years after the date of the suspension of sentence, the prosecuting attorney might allege that the terms of the probation had been violated. Although the maximum statutory period of imprisonment is two years, the defendant might still be sentenced to serve the maximum term although he had been on probation for three years.[35] To avoid the injustices that might arise under this construction, the better-framed probation acts provide that the conditions of suspension cannot run for a longer period

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[31]Gabriel v. Brame, 28 So.2d 581, 583, 584 (Miss. 1947).

[32]Coleman v. State, 6 So.2d 2 (Fla. 1942); Dilley v. Commonwealth, 243 Ky. 464, 48 S.W.2d 1070 (1932); *ex parte* Fisher, 95 W.Va. 397, 121 S.E. 287 (1924); Hancock v. Rogers, 140 Ga. 688, 79 S.E. 558 (1913); Miller v. Aderhold, 288 U.S. 206, 53 S.Ct. 325, 77 L.Ed. 702 (1933).

[33]Bolton v. State, 166 Miss. 290, 146 So. 452 (1933); Fuller v. State, 57 So. 6, 39 L.R.A.(N.S.) 242, *mod. on sugg. error* 100 Miss. 811, 57 So. 806 (1912); Hoggett v. State, 101 Miss. 271, 57 So. 811 (1912).

[34]Miss. Code Ann. § 2087 (1942): "Any parent who shall desert, unlawfully neglect or refuse to provide for the support and maintenance of his or her child or children under the age of 16 years, leaving such child or children in destitute or necessitous circumstances shall be guilty of a felony and on conviction thereof, shall be punished by a fine of not less than twenty-five dollars, nor more than five hundred dollars, or by imprisonment in the penitentiary not exceeding two years, or both, in the discretion of the court."

[35]Bolton v. State, 166 Miss. 290, 146 So. 453 (1933).

of time than the maximum period of imprisonment that might be inflicted upon the defendant.[36]

Because the suspension of sentence is considered to be a matter of grace, the general rule is that the suspension may be terminated and the sentence invoked merely on the belief by the court that the conditions have been violated. The defendant is not entitled to a trial on the merits. Arbitrary revocation of suspension is not considered to be violative of due process.[37]

Conclusion

The basis for the decision of the Mississippi Supreme Court in upholding the constitutionality of Section 2541 of the Code of 1942 in *Gabriel v. Brame*[38] is subject to a certain amount of criticism from a strictly theoretical approach. The court, nevertheless, has reached a desirable result, which is in complete harmony with current views as to the best means to deter crimes and rehabilitate those violators of the law who are not confirmed criminals. The inadequacy of the Mississippi statute on the subject of suspension of sentences and the absence of workable machinery to administer the system has been exposed to the public. The right, as it exists today in our state, is more nearly a liability and a source of confusion than the aid to securing justice that it might be. The following recommendations are submitted as possible aids in increasing the effectiveness of the suspension of sentence statute in Mississippi. (1) Limiting the right to cases involving misdemeanors is perhaps too narrow in scope. Oftentimes the circumstances surrounding a conviction for a felony are such that a suspension of sentence would be much more in keeping with current conceptions of right and justice than would be imposition of the statutory penalty. (2) The conditions on which a sentence might be suspended should be more clearly defined in the statute. Proper conditions would include: (a) good behavior; (b) support for the legal dependents of the defendant; (c) restitution to the injured party of the property involved; (d) restitution of actual pecuniary loss suffered; and (e) those conditions of a similar character which the trial judge believes to be appropriate to the peculiar circumstances of the case. Payment of damages should be expressly excluded as a valid condition of

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[36]Representative of this type of limitation on probation is § 12031, Penal Code of California: "The court, judge, or justice thereof, in the order granting probation, may suspend the imposing, or the execution of the sentence and may direct that such suspension may continue for such period of time *not exceeding the maximum possible term of such sentence* . . ." [All italics added.] See *Ex parte* Acosta, 149 P.2d 757 (Cal. 1944).

[37]Varela v. Merrill, 74 P.2d 569 (Ariz. 1937).

[38]28 So.2d 58 (Miss. 1947).

suspension. (3) The period during which the probation could extend should be limited to the length of the maximum sentence which might be imposed under the statute. (4) Provisions should be made for a special file to which such cases would be referred upon the suspension of sentence on condition. (5) The machinery for the administration of this system should be dealt with in code sections separate from those relating to the violation of conditions of parole. Officers should be designated to supervise the conduct of the defendant during the period of probation. (6) Provisions should be made for a thorough hearing before invoking the sentence when it has been alleged that the terms of probation have been violated. A new trial on the merits is not advocated.

The potentialities in a well-considered system for suspension of sentences are unlimited; a confused and inadequate system retards and obstructs the efficiency of our judiciary.

Owen Palmer

ARMY AND NAVY—EXTENT OF POWER OF CIVIL COURTS TO REVIEW COURTS-MARTIAL BY HABEAS CORPUS PETITION

X, serving overseas as a soldier in the Army of the United States during time of war, was convicted of rape by a general court-martial. He was subsequently returned to the United States and placed in prison. Maintaining that he was tried and convicted without due process of law and in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States, X now brings a habeas corpus proceeding. He alleges that he is being illegally held in custody and deprived of his liberty. HELD: A habeas corpus petition is available to test the validity of the judgment of a court-martial attacked on the ground that constitutional rights of the petitioner have been violated. *Anthony v. Hunter*, 71 F.Supp. 823 (D.C.Kan. 1947).

A court-martial is the creature of statute, and, as a body or tribunal, it must be convened and constituted in entire conformity with the provisions of the statute, or else it is without jurisdiction.[1] Since the case of *Wise v. Withers*,[2] as interpreted by Chief Justice Marshall in Ex parte *Watkins*,[3] a court-martial has been held to be one of those inferior courts of limited jurisdiction which are subject to the general law of the land and whose judgments may be questioned collaterally. When rendered within the sphere of its limited jurisdiction, however, the decision of the court-martial is final.[4]

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[1]McClaughry v. Deming, 186 U.S. 49, 62, 63 (1901). As was said by Mr. Chief Justice Waite in *Runkle v. United States*, 122 U.S. 543, 555 (1886): "A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a special duty. When the object of its creation has been accomplished, it is dissolved."

[2]3 Cranch 331 (1806).

[3]3 Pet. 193, 209 (1830). The distinction between a court-martial and a military commission should be noted at this point. The distinction, as observed in Ex parte *Vallandigham*, 68 U.S. 243 (1863) is to the effect that military jurisdiction is of two kinds: (1) that which is conferred and defined by statute, and (2) that which is derived from the common law of war. Military offenses under the "rules and regulations" of war and under the statutory jurisdiction must be tried as therein directed and by a court-martial board. Those military offenses which do not come under the jurisdiction of the court-martial board, but which are either derivative of the common law of war or reserved expressly by statute, are tried by the military commission. Ex parte *Milligan*, 4 Wall. 2 (1866) summarizes the types of military jurisdiction and attempts to define the point where martial law replaces civil law. However, in Ex parte *Quirin*, 317 U.S. 1 (1942) the Milligan case is distinguished. The extent of review by civil courts of the judgment of a military commission is further commented upon in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) and In re *Yamashita*, 327 U.S. 1 (1946). Suffice it here to say that once the Supreme Court of the United States satisfies itself that the military commission was lawfully authorized and was proceeding according to law, it will not inquire into the procedure and rules of evidence employed by the *military commission*. The trend of recent cases in the lower courts, however, seems to be toward inquiring into the procedure and rules of evidence employed by a *court-martial*—to such an extent as will enable them to ascertain if fundamental rights of the petitioner have been violated.

[4]To give effect to the sentences of a court-martial it must appear affirmatively and unequivocally that the court was legally constituted; that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with; and that its sentence was conformable to law. There are no presumptions in its favor, so far as these matters are concerned. Anthony v. Hunter, 71 F. Supp. 823, 828 (D.C. Kan. 1947) in which numerous authority is cited in support.

A civil court is not a tribunal sitting in appellate review of the court-martial judgment. The proceedings of a court-martial cannot be impeached for mere errors or irregularities committed within the sphere of its authority;[5] nor can the guilt or the innocence of the accused be inquired into.[6] These proceedings are open to review by the civil courts only for the purpose of ascertaining whether or not the court-martial had jurisdiction, and, if it had, whether or not it exceeded its powers.[7] If the court-martial originally had jurisdiction, it must be shown that at some stage of the proceedings under its governing laws jurisdiction was lost.[8] If the court-martial does not have jurisdiction, the decision is void, not voidable.[9]

The remedy of habeas corpus is not available to one who is properly detained under arrest by the military authorities in a region in which martial law is in force.[10] The single inquiry, the test, which has been imposed in a habeas corpus proceeding brought to obtain a discharge from an imprisonment ordered by a military court, is that of jurisdiction.[11] If it is established that the court-martial had and kept jurisdiction, the habeas corpus must be denied and the petitioner remanded. If jurisdiction is found to have been wanting, the habeas corpus must be sustained and the petitioner discharged.[12]

A recent group of cases,[13] of which the principal case is one, have again looked into the power of the civil courts to review, by habeas corpus petition, the decisions of military tribunals. The trend of these decisions seems to be toward requiring greater proof that both the court-martial and the preliminaries to it were not conducted in such a manner as to violate the basic standard of fairness which is involved in the concept of our constitutional law.[14]

The holding of the principal case is in keeping with this trend. The civil courts are becoming more concerned regarding their duty to maintain the constitutional guaranties of citizens in the military service. While recognizing the military necessity of a separate judicial system and procedure for the armed services, the civil courts are maintaining their right and power to ascertain whether, in practice, such separate military system and procedure safeguards the constitutional rights and privileges of the members of the armed forces. The civil courts still support

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[5]Keyes v. United States, 109 U.S. 336 (1883); Swaim v. United States, 165 U.S. 553 (1896).

[6]*In re* Corbett, 6 F.Cas.No.3, 219 (D.C.N.Y. 1877).

[7]United States v. Daniels, 279 F. 844 (C.C.A.2d 1922), reversing *Ex parte* Harris, 268 F. 911 (D.C.N.Y. 1920); United States v. Bullard, 290 F. 704 (C.C.A.2d 1923); Crouch v. United States, 13 F.2d 348 (C.C.A.2d 1926).

[8]United States v. Hunt, 254 F. 365 (D.C.N.Y. 1918).

[9]Dynes v. Hoover, 61 U.S. 65 (1857).

[10]*In re* Boyle, 6 Idaho 609, 57 P. 706 (1899); *In re* Moyer, 35 Colo. 159, 85 P. 190 (1904).

[11]*In re* Grimley, 137 U.S. 147 (1890); Collins v. McDonald, 258 U.S. 416 (1922).

[12]McClaughry v. Demning, 186 U.S. 49 (1901); *In re* Wulzen, 235 F. 362 (D.C.Ohio 1916); Hoskins v. Dickerson, 239 F. 275 (C.C.A.5th 1917); Givens v. Zerbst, 255 U.S. 11 (1920).

[13]It might be noted that all of these recent cases have been decided in the federal district courts; and that, as of the time of this writing, the Supreme Court of the United States has not rendered a decision on these cases. However, the attitude of Congress may be obtained from H.R. 2575, 80th Cong., 1st Session (1947).

[14]United States v. Hiatt, 141 F.2d 664, 666 (C.C.A.3rd 194); Hicks v. Hiatt, 64 F. Supp. 238, 249, 250 (D.C.Pa. 1946); Boone v. Nelson, 72 F. Supp. 807, 808 (D.C.Me. 1947).

their right to review upon the technical ground of ascertaining jurisdiction; but when there is a constitutional question presented they will now give the petitioner a much more comprehensive review than was allowed in the past. Today, when there is raised a question concerning the violation of constitutional rights, the civil courts will review the court-martial to such an extent as will adequately enable them to decide whether, in fact, the accused was deprived of any fundamental rights guaranteed by the Constitution of the United States—even if it means examining the record to ascertain errors in procedure which precluded a fair trial. If they find that a violation of constitutional rights has occurred, they will discharge the petitioner. *Frank E. Shanahan, Jr.*

AUTOMOBILES—MOTOR VEHICLE TRANSFER STATUTES—INTERPRETATION OF STATUTES

Plaintiff placed an order with defendant for a new car and made a deposit thereon. Some months later, the defendant notified him that his car was unavailable, but that another could be supplied. The plaintiff accepted the proposal and sent the balance due to the defendant, who noted the receipt on the original order. Two days later, the defendant refused to deliver and tendered plaintiff a check for the full amount paid. Plaintiff refused and sued in replevin, describing the property exactly. HELD: Plaintiff could not establish title as the New Jersey statute regulating purchase and sale of automobiles was not complied with; thus replevin suit fails. *Vida v. Ruckle,* 53 A.2d 312 (N.J. Law 1947).

The essential provisions of the statute in question required that the manufacturer's bill of sale give the manufacturer's engine number; that assignments of the original bill of sale be witnessed by two persons and be notarized; and that all assignments be kept with the original bill of sale. This type statute is found with variations in all states. Some states require documentary evidence to be with the machine;[1] others require buyer and seller to endorse the registration certificate and report the transaction to a state officer within a prescribed time,[2] upon which a new certificate is issued to the transferee and signed by him to constitute delivery;[3] and yet others provide that the sale shall be fraudulent and void unless the certificate of title is passed with an assignment thereon and a statement of all incumbrances at the time of delivery.[4]

The present case deals only with the statute in relation to the buyer and seller, but the provisions of similar statutes have been dealt with extensively in cases

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[1]Merchants' Securities Corp. v. Lane, 106 N.J.Law 169, 147 A. 385 (1929).

[2]Hammond Motor Co. v. Warren, 113 Kan. 44, 213 P. 810 (1923); Armstrong v. Boomansour, 251 N.Y. 590, 168 N.E. 439 (1929).

[3]*In re* Senetos, 29 F.2d 854 (D.C.Cal 1928); Honnold v. Pac. Finance Corp., 105 Cal.App. 152, 286 P. 1101 (1930); Herbert v. Powell, 90 Cal.App. 782, 266 P. 620 (1928); Samuels v. Barnet, 79 Cal.App. 529, 250 P. 405 (1926); Crandall v. Shay, 61 Cal.App. 56, 214 P. 450 (1923); Evans v. Patten, 78 Utah 116, 1 P.2d 959 (1931).

[4]Howell v. Conn. Fire Ins. Co., 215 Mo.App. 386, 257 S.W. 178 (1924).

concerning conditional sales,[5] mortgagors,[6] insurance companies,[7] gifts,[8] attachments,[9] new car dealers,[10] and used car dealers.[11]

In jurisdictions which construe the purpose of such a statute as the protection of the public against fraud or imposition, all contracts in violation thereof are void,[12] as are all transfers which ignore or disregard the statute.[13] Such transfers convey no title[14] and do not confer on either party a remedy at law.[15] Under this construction, if one party does comply with the statute, his interests and title are protected while the non-complying party has no remedy. Thus, a dealer in used cars who does not comply with the statute in purchasing a car has no action of replevin against a subsequent buyer whose check is dishonored, but who has complied with the statute by obtaining a certificate of title.[16] An innocent purchaser

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[5]Gasque v. Saidman, 44 A.2d 547 (D.C. 1946); Workmen v. Republic Mut. Ins., 44 Ohio St. 37, 56 N.E.2d 190 (1945).

[6]Buss v. McKee, 176 P.2d 268 (Colo. 1947); Union Bank and Trust Co. v. Willey, 24 N.W.2d 796 (Iowa 1947); Mound City Finance Co. v. Frank, 199 S.W.2d 902 (Mo.App. 1947).

[7]Garuba v. Yorkshire Ins. Co., 9 N.W.2d 817 (Iowa 1944); Hicksbough Lbr. Co. v. Fidelity and Casualty Co., 177 S.W.2d 802 (Tex.Civ.App. 1944).

[8]McDonald v. Scanlon, 331 Ill.App. 107, 72 N.E.2d 574 (1947); *In re* Baumstimler's *Estate,* 159 Kan. 316, 153 P.2d 927 (1945); *In re* Albert's Will, 68 N.Y.S.2d 539 (N.Y.Sup.Ct. 1947); 57 Dauph. 438 (Pa. 1947).

[9]Thiering v. Gage, 132 Or. 92, 284 P. 832 (1930).

[10]Motor Inv. Co. v. Knox City, 174 S.W.2d 482 (Tex. 1944).

[11]Freitas v. Marsh, 161 P.2d 565 (Cal.App. 1945); Lux v. Lockridge, 150 P.2d 127 (Idaho 1944); Pearl v. Interstate Securities Co., 198 S.W.2d 867 (Mo.App. 1947); Martin v. Ridge Motor Sales, 78 OhioApp. 116, 69 N.E.2d 93 (1947); Commercial Fin. Corp. v. Burke, 145 P.2d 473 (Ore. 1944); Motor Inv. Co. v. City of Hamlin, 179 S.W.2d 278 (Tex. 1944).

[12]Syraishka v. Rieniozek, 327 Ill.App. 218, 63 N.E.2d 675 (1946); Kelly v. Lofts, 253 Mich. 552, 235 N.W. 250 (1931); Ittleson v. Hagan, 245 Mich. 56, 222 N.W. 145 (1928); Riss & Co. v. Wallace, 350 Mo. 1208, 171 S.W.2d 641 (1944), *aff'd,* 195 S.W.2d 881 (Mo.App. 1947); Majors v. Majors, 153 Pa.Super. 175, 33 A.2d 442 (1944). But gifts made in violation of the statute are valid; the fact that the mother of the donor of an automobile secured a certificate of title after the donor's death did not preclude the donee from asserting her title to the automobile. McDonald v. Scanton, 331 Ill.App. 107, 72 N.E.2d 574 (1947). The gift of an automobile by the purchaser immediately given to the donee is not invalid because of the failure of the donor and donee to comply with the statute. *In re* Baumstimler's Estate, 159 Kan. 316, 153 P.2d 927 (1945). The statute declaring ownership void without a certificate of title does not, of itself, defeat an otherwise valid gift inter vivos. Cohn v. Rosenberg, 57 Dauph. 348 (Pa. 1947).

[13]C.I.T. Corp. v. Byrnes, 38 S.W.2d 750 (Mo.App. 1931); Drown v. Tough, 225 Mo.App. 1017, 38 S.W.2d 736 (1931); Platner v. Bourne, 275 S.W. 590 (Mo.App. 1925).

[14]Redwine v. Trowbridge, 99 Cal.App. 762, 270 P. 666 (1929); Buss v. McKee, 176 P.2d 268 (Colo. 1947); Syraishka v. Pieniozek, 327 Ill.App. 218, 63 N.E.2d 675 (1946); Mound City Finance Co. v. Frank, 199 S.W.2d 902 (Mo.App. 1947); Pearl v. Interstate Securities Co., 198 S.W.2d 867 (Mo.App. 1947); Riss v. Wallace, 350 Mo. 1208, 171 S.W.2d 641 (1944); Muzenich v. McCain, 220 Mo.App. 502, 274 S.W. 888 (1925); Howell v. Conn. Fire Ins. Co., 215 Mo.App. 386, 257 S.W. 178 (1924); Oesterman v. King Auto Finance, 111 N.J.Law 119, 166 A. 704 (1933); Thomas v. Mullins, 153 Va. 383, 149 S.E. 494 (1929).

[15]Winne v. Ford, 88 Cal.App. 308, 263 P. 545 (1928); Mound City Finance Co. v. Frank, *supra* note 14; Pearl v. Interstate Securities Co., *supra* note 14; Riss v. Wallace, 350 Mo.App. 1208, 171 S.W.2d (1944); Fiedler v. Bigelow, 250 Ohio App. 456, 159 N.E. 131 (1926); Grapeland Motor Co. v. Lively, 274 S.W. 168 (Tex.Civ.App. 1925).

[16]Pearl v. Interstate Securities Co., 198 S.W.2d 867 (Mo.App. 1947).

complying with the statute voids the chattel mortgage of a third party mortgagee who knew that the mortgagor-seller had not obtained the proper certificate of title.[17]

Some jurisdictions hold a contract made in violation of such a statute is not void if it appear from the wording of the statute that the legislature did not so intend. This conforms with the Mississippi view.[18] Thus if the statute does not declare such a contract void, but merely states that it is unlawful and prescribes a penalty for its violation, a sale without such compliance will not be absolutely void.[19] In such jurisdictions the proceedings turn on the apparent legal and equitable principles involved, rather than declaring the sale void.[20] The purchaser is subject to a penalty for negligence to comply, but does not lose ownership; his title is good against all except creditors or innocent purchasers who relied upon the state of the record.[21] Thus, if all the elements of replevin necessary at common-law are present, the action is not barred by failure to comply with the statute. Mississippi so held in an action by a plaintiff to recover insurance on his car, stating that where the insured has possession of the car, but has not complied with the statute, he is the owner for all practical purposes and can recover as the sole and unconditional owner under the contract of insurance.[22]

The Mississippi statute is as follows:

> It shall be unlawful for any person, firm, or corporation to sell, purchase or own any automobile unless the seller shall furnish to and the buyer shall take and reserve, a written memorandum, signed by the seller, showing the make and model, motor number and other identifying marks thereof,

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[17]Buss. v. McKee, 176 P.2d 268 (Colo. 1947); Mound City Finance Co. v. Frank, 199 S.W.2d 902 (Mo.App. 1947).

[18]Equitable Credit Co. v. Coper, 146 Miss. 868, 111 So. 748 (1927); Hartford Fire Ins. Co. v. Knight, 146 Miss. 862, 111 So. 748 (1927). *Cf.* Motor Inv. Co. v. Hamlin, 179 S.W.2d 278 (Tex. 1944). Texas courts declared that "first sales" do not need a certificate of ownership in transferring title from manufacturer to owner. The Motor Co. made the chassis and sold to dealer; dealer transferred to another who converted it to a fire truck and resold to city. Each transfer was a "first sale" and no certificate of title was necessary, as none was "owner," but manufacturer or dealer.

Nor is a certificate necessary for second-hand automobiles. Hennessey v. Auto Owners Ins. Assoc., 282 S.W. 791, 46 A.L.R. 521 (Tex.Com.App. 1926); Home Ins. Co. v. Stubblefield, 287 S.W. 297 (Tex.Civ.App. 1926)

[19]7 BLASHFIELD, CYCLOPEDIA OF AUTOMOBILE LAW AND PRACTICE, § 4262 (1935 ed.). This view is held in Ky., Miss., N.J., Ohio, Okla., Pa., and Texas.

[20]Union Bank & Trust Co. v. Willey, 24 N.W.2d 796 (Iowa 1947). Neither sale of truck nor mortgage by buyer was rendered invalid by failure to comply with statute on registration. Both seller and mortgagor were estopped from asserting the statute as a defense, since the mortgagee had relied upon their promise to comply with the statute.

[21]Parrott v. Gulick, 145 Okla. 129, 292 P. 48 (1930); Thiering v. Gage, 132 Or. 92, 284 P. 832 (1930).

[22]Hartford Fire Ins. Co. v. Knight, 146 Miss. 862, 111 So. 748 (1927). *Accord,* Garuba v. Yorkshire Ins. Co., 9 N.W.2d 817 (Iowa 1944); Hicksbaugh Lbr. Co. v. Fidelity & Casualty Co. of N.Y., 177 S.W.2d 802 (Tex.Civ.App. 1944). In these cases the court held that where the owner has an insurance contract on the car and makes an executory contract to sell, that the insured ceases to be the sole and unconditional owner of the automobile under the insurance policy, even though the statute has not been complied with and the insured still has legal title.

> the address of the seller, the name and address of the person from whom the seller purchases, which memorandum shall also be signed by two well-known persons as witnesses whose address and occupation shall be shown, which memorandum may be in the following form, . . .

The penalty for violating this statute is fine or imprisonment, or both.[23]

Cases decided under this statute have been very liberal. In fact, there is no Mississippi case in which the statute has been successfully invoked. The Mississippi doctrine recognizes ownership in the transferee by declaring that it is unlawful to own an automobile without complying with the statute. Such recognition gives efficacy to the transfer and makes it good for all practical purposes, since the legislative intent has been determined as solely to facilitate detection and prevent theft.[24]

It is apparent that although the statute in Mississippi is in form mandatory, it is not construed to work a hardship on an unsuspecting buyer or seller who does not comply with it. In Mississippi, in a suit to replevy a new automobile which has never been delivered, the Motor Vehicle Transfer Act would not be material as Mississippi follows the common-law action of replevin requiring either title or possession in the plaintiff. The automobile never having been delivered, the title has not passed to the buyer, and he has never had prior possession. The only available remedies to a plaintiff in Mississippi would be an action for specific performance in equity by virtue of the equitable title having passed to the buyer at the making of the contract of purchase, or an action at law for damages for breach of contract.

Clifton Maxwell

CONSTITUTIONAL LAW—FOURTEENTH AND FIFTEENTH AMENDMENTS—STATE ACTION WHERE PARTY KEPT NEGRO FROM VOTING IN SOUTH CAROLINA WHITE PRIMARY

South Carolina eliminated from its constitution and statutes all regulations of political parties and primary elections, but the details incident to the primary remained unchanged in party hands. For many years one party had controlled the electoral system, and nomination of candidates in the primary was equivalent to election. HELD: Action of the party in restricting voting in the primary to white persons was state action and therefore illegal. *Elmore v. Rice,* 72 F.Supp. 516 (E.D.S.C. 1947).

This case marks the first decision by the courts on the primary election machinery of South Carolina since the legislature of that state, apprehensive because of the precedent-shattering pronouncement by the Supreme Court in *Smith v. Allwright,*[1] met in special session and struck from the statute books all of the primary election laws of the state.[2] The immediate judicial history of the so-

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[23]MISS. CODE ANN. § 8065 (1942).

[24]Equitable Credit v. Cooper, 146 Miss. 868, 111 So. 749 (1927); Hartford Fire Ins. Co. v. Knight, 146 Miss. 862, 111 So. 748 (1927).

[1]321 U.S. 649 (1944). For discussion of this case see Cushman, *The Texas "White Primary" Case—Smith v. Allwright,* 30 CORN.L.Q. 66 (1944).

[2]Acts of S. C., Spec. Sess. 1944, No. 688-832, pp. 2215-2347.

called "white primary" cases stems from the decision in *Nixon v. Herndon*,[3] wherein the Supreme Court held that the state of Texas could not deny a negro the right to vote in a Democratic primary.[4] The Texas legislature attempted to avoid that decision by expressly placing in the hands of the party executive committee the power to prescribe the qualifications of its members and, thereby, of the voters in the primary. This strategy met with failure when action by the party executive committee in limiting membership to "white Democrats" was held[5] to be state action and thus a violation of the Fourteenth Amendment. Victory for Texas Democrats finally came, however, when the Court in 1935 held in the case of *Grovey v. Townsend*[6] that action by the convention of the party in determining the qualifications of voters in the primary, in the absence of any statutory provisions by the state, was not state action. It appeared that the inroads which the courts had been making into the electoral systems of the Southern states had been stopped.

An inkling of impending trouble came, however, in 1941 when the Court, without specifically reversing *Grovey v. Townsend,* held in a Louisiana vote fraud case[7] that a primary wherein nomination of candidates for Congress was tantamount to election was in fact an election within the constitutional meaning of the word and therefore subject to regulation by Congress.[8] In 1944 came the blow which moved South Carolina's legislature to erase from the statutes and the constitution all reference to primaries. That blow came in the form of the decision in the *Allwright* case, wherein the holding of nine years before was overruled, and the slightest control of primaries by the states, where such primaries were the equivalent of final elections, became state action.

The decision in all of these cases has hinged on the question of whether the control and operation of the primaries was state action as contemplated in the Fourteenth and Fifteenth Amendments.[9] Some of the criteria which the courts have used in determining what constituted state action in regard to primaries have been: (1) whether the state or the party prescribed the electoral procedure;[10] (2)

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[3]273 U.S. 536 (1927).

[4]The Texas statute read in part as follows: "In no event shall a negro be eligible to participate in a Democratic party primary election held in the state of Texas, and should a negro vote in a Democratic primary election, such ballot shall be void and election officials are herein directed to throw out such ballot, and not count the same." TEX. REV. CIV. STAT., Art. 3107 (1925).

[5]Nixon v. Condon, 286 U.S. 73, 88 A.L.R. 458 (1932).

[6]295 U.S. 45, 97 A.L.R. 680 (1935).

[7]U.S. v. Classic, 313 U.S. 299 (1941).

[8]"The recognition of the place of the primary in the electoral scheme makes clear that state delegation to a party of the power to fix the qualifications of primary elections is delegation of a state function that may make the party's action the action of the state." Case cited *supra,* note 7.

[9]Civil Rights Cases, 109 U.S. 3 (1883); U.S. v. Reese, 92 U.S. 214 (1875); U.S. v. Harris, 106 U.S. 629 (1882); Karem v. U.S., 121 F. 250 (C.C.A. 6th 1903); ROTTSCHAEFER, HANDBOOK OF AMERICAN CONSTITUTIONAL LAW §§ 311-312 (1939).

[10]Robinson v. Holman, 811 Ark. 428, 26 S.W.2d 66 (1930); People *ex rel.* Breckton v. Board of Election Commissioners of Chicago, 221 Ill. 9, 77 N.E. 321 (1906).

who set the qualifications for voting;[11] and (3) who paid the expenses of the primary.[12]

Now, however, after the decision in the principal case, it is apparent that these criteria have given way to a much more sweeping test. That test amounts to this: Was the primary actually the means whereby the people expressed their choice in electing their officials? The reasoning behind this view seems to be that in the one-party states of the South the party is an agent of the state, that there the primary supplants in purpose and effect the general election as an agency for choosing officials, and that, as a practical matter, any action of the party in regulating or controlling the primary and those who vote therein must be imputed to the state itself.[13] It now seems clear on the basis of these recent decisions that any attempt through party machinery, entirely unfettered by statutory provisions, to keep negroes from voting will be declared by the federal courts to be state action and thus a violation of the Fourteenth and Fifteenth Amendments.

In adhering to this trend the federal courts have apparently adopted a different measuring stick in regard to party activities from that which the Supreme Court used in the case of *Herndon v. Lowry*[14] in recognizing the right of the Communist Party to a wide scope of political activity in spreading its subversive doctrines. It hardly seems consistent that the Democratic Party organizations of the South should be accorded less freedom of movement than the Communists.[15]

Thus far there has been no case involving Mississippi's primary system,[16] but in view of the federal courts' apparent determination to outlaw the white primary at any cost it would appear that Mississippi stands on ground hardly more firm than that which has just sunk beneath the feet of South Carolina. Despite the efforts of the Mississippi legislature last spring to design a satisfactory primary law,[17] it is evident that any effort, whether by state or party, which the courts can interpret as a move to disfranchise negroes as such, will be held to be state action and therefore illegal.

William F. Winter

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[11]Nixon v. Herndon, *supra* note 3; Nixon v. Condon, *supra* note 5; Grovey v. Townsend, *supra* note 6; White v. Democratic Executive Committee, 60 F.2d 973 (S.D. Tex. 1932); Drake v. Executive Committe of Democratic Party for City of Houston, 2 F.Supp. 486 (S.D. Tex. 1933); Grigsby v. Harris, 27 F.2d 942 (S.D. Tex. 1928).

[12]Nixon v. Condon, *supra* note 5; West v. Bliley, 42 F.2d 101 (C.C.A. 4th 1930); Robinson v. Holman, *supra* note 10.

[13]U.S. v. Classic, *supra* note 7; Smith v. Allwright, *supra* note 1.

[14]301 U.S. 242 (1937).

[15]SUTHON, A DEFENSE OF THE CONSTITUTIONAL RIGHT OF THE WHITE DEMOCRATIC PARTY IN LOUISIANA TO CONDUCT A WHITE PRIMARY 16 (1947). "The fact remains that the objects of political organizations are intimate to those who compose them. They do not concern the general public. They directly interest, both in their conduct and in their success, only so much of the public as are comprised in their membership, and then only as members of the particular organization." Grigsby v. Harris, *supra* note 11.

[16]MISS. CODE ANN. §§ 3105-3203 (1942).

[17]Miss. Laws, 1st Spec. Sess. 1947, HB. No. 36, p. 21. In accordance with the mandate contained in that act, the Democratic State Executive Committee issued on May 15, 1947 an 18-point statement of principles to which all participants in the Democratic primary must conform. In announcing the requirements the chairman of the Committee stated that they had been adopted primarily to safeguard white supremacy at the ballot box by "associating together those of like mind as to government matters." Memphis Commercial Appeal, May 15, 1947, p. 15, col. 1.

DIVORCE—ATTACK ON DECREE—LACHES

In 1894 complainant's husband obtained a decree of divorce without serving process on her and by fraudulently entering her appearance by attorney. The following year the husband married the defendant, Banie Stanley; and eight children, also defendants, were born of this second marriage. Later complainant also remarried, but upon being informed by her first husband that this marriage was not lawful she separated from her second husband, who subsequently divorced her. The complainant and her first husband continued to live in the same community until the death of the first husband in 1944. After his death the complainant first learned of the 1894 divorce decree and filed her bill to have it annulled. HELD: The decree of divorce granted nearly fifty years ago will not be set aside "on the ground of laches, and because of the disadvantage and injustice that would result to the appellees by a decision to the contrary."[1] *Stanley v. Stanley et al.*, 29 So.2d 641 (Miss. 1947).

Laches is an unexcused delay for an unreasonable time in bringing a suit.[2] This doctrine is expressed by the maxim, "Equity aids the vigilant and not those who slumber on their rights."[3] A divorce decree wil not be vacated or set aside if the party seeking to have it vacated has been guilty of laches.[4] If a bill of complaint shows on its face a defense on the ground of laches, it is subject to demurrer.[5]

Most of the elements of the defense of laches are patent from the allegations of the bill of complaint in the instant case. The complainant has delayed for nearly fifty years in bringing her suit to set aside the decree, and all the persons connected with the original case, who are charged with fraud or misconduct, are either dead or unknown. An allowance of the bill of complaint will prejudice the defendants by making the second marriage illegal and the eight innocent children born of that marriage illegitimate. Many cases hold that, where the party obtaining a divorce has subsequently remarried, the divorced party cannot have the decree vacated after any substantial delay,[6] or after the party obtaining the decree has died.[7] If the

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[1]Stanley v. Stanley et al., 29 So.2d 641, 646 (Miss. 1947).

[2]2 POMEROY, EQUITY JURISPRUDENCE § 418 (5th ed. 1941); GRIFFITH, MISS. CHANCERY PRACTICE § 41 (1925).

[3]*Ibid.*

[4]2 SCHOULER, MARRIAGE AND DIVORCE § 1745 (6th ed. 1921); AMIS, DIVORCE AND SEPARATION IN MISS. § 306 (1935).

[5]Norris v. Burnett, 108 Miss. 407, 66 So. 332 (1914); Marks v. Toney, 196 Miss. 572, 18 So.2d 452 (1944); Speidel v. Henrici, 120 U.S. 377 (1877); GRIFFITH, MISS. CHANCERY PRACTICE § 182 (1925).

[6]Joy v. Miles, 190 Miss. 255, 199 So. 771 (1941); Cratin v. Cratin, 178 Miss. 881, 174 So. 255 (1937); Barnett v. Miller, 131 Ark. 110, 198 S.W. 673 (1919); Zoellner v. Zoellner, 46 Mich. 511, 9 N.W. 831 (1881); Gioia v. Gioia, 245 App.Div. 373, 282 N.Y.S. 852 (1935); Green v. James, 147 Okla. 273, 296 P. 743 (1931); Hodnett v. Hodnett, 163 Va. 644, 177 S.E. 106 (1934); Dry v. Rice, 147 Va. 331, 137 S.E. 473 (1929); Cameron v. Cameron, 107 W.Va. 655, 150 S.E. 225 (1929); *cf.* Wright v. Wright, 5 S.W.2d 478 (Tex.Civ.App. 1932).

[7]Cratin v. Cratin, 178 Miss. 881, 174 So. 255 (1937); Evans v. Woodsworth, 213 Ill. 404, 72 N.E. 1082 (1904); Re Brigham, 176 Mass. 223, 57 N.E. 238 (1900); McElrath v. Littell, 120 Minn. 380, 139 N.W. 708, 44 L.R.A.(N.S.) 505 (1913); Horton v. Stegmyer, 99 C.C.A. 332, 175 F. 736 (1910).

divorced party has accepted any benefits from the divorce,[8] or if he has, himself, remarried,[9] many courts hold that laches bars any action to set aside the decree.

In the instant case, however, the complainant sought to excuse her delay by alleging that she was prevented by the husband's representations from ascertaining that a decree had been granted and that she had no actual knowledge of the existence of such a decree. A divorce decree will not be set aside if the facts are such as to excuse the delay.[10] It is often held that a complainant seeking to set aside a divorce decree cannot be charged with laches if he had no knowledge of the fact that the decree had been rendered until shortly before bringing his suit for cancellation.[11] But if a complainant could have informed himself by reasonable diligence of the existence of a fraudulent decree or judgment, he may be said to have sufficient notice to put him on inquiry or to have imputed knowledge.[12] This reasoning has been applied to actions attacking divorce decrees.[13] The fact that the party complaining was for a long time a resident of the neighborhood in which the fraud took place,[14] the fact that the fraud was notorious and public,[15] and the fact that an examination of public records would have disclosed the fraud[16] are all strong indications that reasonable diligence was not employed.

The court in the case at hand was on safe ground in holding that the complainant, if she had not actual knowledge of the fraud, had sufficient notice from which a reasonable person would have inquired whether or not a decree of divorce had been rendered. *John D. Guyton*

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[8]De Hereu v. Hereu, 6 Ariz. 270, 56 P. 871 (1899); Kearley v. Hunter, 154 Fla. 81, 16 So.2d 728, 152 A.L.R. 185 (1944); Green v. James, 147 Okla. 273, 296 P. 743 (1931).

[9]Joy v. Miles, 190 Mis. 255, 199 So. 771 (1941); Kearley v. Hunter, *supra,* note 8; Potts v. Potts, 10 W.N.C. (Pa.) 102 (1881).

[10]Caswell v. Caswell, 120 Ill. 377, 11 N.E. 342 (1887) (due diligence after discovery of the fraud); Leathers v. Stewart, 108 Me. 96, 79 A. 16 (1911) (no disadvantage or prejudice to the defendants); Sturm v. Cooper, 145 Ore. 583, 28 P.2d 231 (1934) (husband constantly eluded wife); Tarr v. Tarr, 184 Va. 443, 35 S.E.2d 401 (1945) (active representations of husband); State *ex rel.* Weidert v. Superior Court of Kings County, 36 Wash. 81, 78 P. 198 (1904) (prevented by fraudulent representations); Everett v. Everett, 60 Wis. 200, 18 N.W. 637 (1884) (destitute circumstances of party seeking to set aside the decree). *But cf.* Nicholson v. Nicholson, 113 Ind. 131, 15 N.E. 223 (1888) (no excuse that delay was caused by erroneously bringing proceedings in another court).

[11]Watts v. Watts, 123 Miss. 812, 86 So. 353 (1920); Evans v. Brown, 198 Miss. 237, 21 So.(2d) 588 (1945); Parramore v. Parramore, 61 Fla. 701, 55 So. 796 (1911); Brown v. Grove, 116 Ind. 84, 18 N.E. 387 (1888); Adams v. Adams, 51 N.H. 388 (1872). *But cf.* Wilkerson v. Wilkerson, 230 Ala. 567, 161 So. 820 (1935), in which case the wife could have had no knowledge since she was insane, yet her suit was barred by the twenty year rule of prescription, regardless of laches.

[12]Buckner and Stanton v. Calcote, 28 Miss. 432 (1855); Comans v. Tapley, 57 So. 546, 101 Miss. 203 (1912); Foster v. Mansfield, C.&L.M.R.Co., 146 U.S. 88 (1892); Johnson v. Standard Mining Co., 148 U.S. 360 (1893); Hardt v. Heidweyer, 152 U.S. 547 (1894); Thornton v. Mayor of City of Natchez, 129 F. 84 (C.C.A. 5th 1904).

[13]Sloan v. Sloan, 102 Ill. 581 (1882); Brockman v. Brockman, 133 Minn. 148, 157 N.W. 1086 (1916); Givernaud v. Givernaud, 81 N.J. Eq. 66, 85 A. 830 (1912); Peyton v. Peyton, 28 Wash. 278, 68 P. 757 (1902); see Hurley v. Hurley, 117 Iowa 621, 19 N.W. 895 (1902).

[14]Foster v. Mansfield, etc., *supra,* note 12.

[15]Thornton v. Mayor of City of Natchez; *supra,* note 13; Peyton v. Peyton, *supra,* note 13.

[16]Rimmer v. Austin, 191 Miss. 664, 4 So.2d 224 (1941); Fleming v. Grafton, 54 Miss. 79 (1876).

DIVORCE AND SEPARATION—PARENT AND CHILD—DEATH OF PARENT AS AFFECTING DECREE FOR SUPPORT AND MAINTENANCE OF MINOR CHILD

Divorce decree was granted to petitioner in 1931 awarding her custody of the two minor children and directing the father to pay ten dollars per week for support of the children. Upon death of the father in 1946 petitioner brought this action against his executrix seeking to have such future amounts as would accrue to the children prior to their majority declared a charge upon the estate, and praying that the installments be continued. The father died solvent. HELD: (4/2) Decedent's duty to contribute to the support of his minor children was terminated by his death, and no claim for installments accruing after his death can now be enforced. *Guinto v. Lo Re* 31 So.2d 704 (Fla. 1947).

Because of the father's avowed right to disinherit his children if he so chooses, the courts have declared generally that his obligation to support and maintain his minor children terminates at his death.[1] However, this doctrine, criticized by text writers and by the courts even in the jurisdictions where it is invoked,[2] has been the subject of substantial inroads. The rule as stated is now held to be applicable only where the family relation at the death of the father is intact and there is no great danger that such an arbitrary power will be exercised.[3]

Under the widely accepted modern rule, where the mother is given custody of the child and the father is ordered to pay her a stipulated amount for its support, such an obligation created by decree of the court does not terminate upon the death of the father in case he dies before the child reaches majority, but survives his death.[4] Broad statutes are in effect in most states giving the courts power in divorce suits to direct such sums as may be just and equitable to be paid for the support of minor children, with power to alter such payments if necessary, and with power to make the sum a lien upon the estate of the parent.[5] Acting under authority of these statutes, when the courts give a decree for the support of a minor child the liability of the father is based on the statute rather than on his common law duty. The father is held to have forfeited his common law right of testamentary discretion by forcing the courts to take jurisdiction in *parens patriae* over the child.[6] The courts are eager to construe their respective statutes in such a manner as to assure the financial security of the child.[7]

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[1]Blades v. Szatai, 151 Md. 135 A. 841, 50 A.L.R. 232 (1927); Rice v. Andrews, 217 N.Y.S. 528, 127 Misc. 826 (1926); MADDEN, DOMESTIC RELATIONS 307 (Hornbook Series 1931); Comments, 36 YaleL.J. 424 (1927), 25 Mich.L.Rev. 555 (1927).

[2]Rice v. Andrews, 217 N.Y.S. 528, 127 Misc. 826 (1926); 2 KENT'S COMMENTARIES (10th Ed.) 255; Comments, 25 Mich.L.Rev. 555 (1927), 36 Yale L.J. 424 (1927).

[3]Miller v. Miller, 64 Me. 484 (1874).

[4]Mansfield v. Hill, 56 Or. 40, 107 P. 471 (1910) (modified on other points in 56 Or. 411, 108 P. 1007 (1910)); Murphy v. Moyle, 17 Utah 113, 53 P. 1010 (1898); Miller v. Miller, 64 Me. 484 (1874).

[5]2 VERNIER, AMERICAN FAMILY LAWS 95 (1932).

[6]Stone v. Bayley, 75 Wash. 184, 134 P. 820 (1913); Miller v. Miller, 64 Me. 484 (1874).

[7]"So solicitous is the law for the welfare of the child that the decree for such support survives the death of the father and may be amended to give the provision for the child's maintenance the effect of a lien upon the estate with priority over

Since the usual support and maintenance decree is a personal decree, some difficulty has been found in obtaining jurisdiction where the wife revives the suit after death of the husband, asking that the decree be amended so as to provide that the installments be continued. But this has been remedied by making the payments a lien upon the property of the father during his lifetime, which lien, of course, survives his death.[8] And in other cases, where the father dies solvent, the obligation is held to be a continuing liability of which the courts retain jurisdiction so long as the minor is in need of support.[9]

The reasoning behind these decisions is tenable, and there is little doubt that such a doctrine is promotive of the general welfare. The resentment often stirred up in a divorce case may well lead to the disinheriting of a child who would otherwise have been provided for. Every parent bringing a child into the world has at least a moral duty to provide for its support during minority. Considerations of humanity require the courts to lend their aid where possible to prevent infants from becoming burdens on society, for benefit of the former as well as the latter.

The courts have refused to carry their power in this respect so far as to burden the decedent's estate: (1) where the deceased is in custody of the child at the time of death (holding that his common law obligation has not been changed);[10] (2) where payments have not been decreed a lien on the estate[11] (discussed above); and (3) where the father was without fault in the divorce suit.[12] Argument on the last point is that the courts should not heap additional obligations on the father simply because of his wife's wrong. It would appear, however, that this argument is not well taken in view of the fact that the additional obligation is not intended to be a punitive measure but is rather designed for the welfare of the child. It is difficult to see why the father whose wrongdoing is the cause of the divorce should be more bitter, and thus more prone to disinherit the child, than the father who is innocent in the causes of the divorce.

This was a case of first impression in Florida. The Florida statutes are similar to those found in other states whose courts hold that such liability continues after death[13] and they are susceptible of just as broad construction. Yet no attempt was made here to distinguish such landmark cases as *Miller v. Miller*[14] and *Creyts v. Creyts*.[15] No lien had been placed on the father's property by the chan-

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rights of the widow and heirs." West v. West, 241 Mich. 679, 217 N.W. 924 (1928) citing Creyts v. Creyts, 143 Mich. 375, 106 N.W. 1111 (1900).

[8]Murphy v. Moyle, 17 Utah 113, 53 P. 1010 (1898); 2 VERNIER, AMERICAN FAMILY LAWS 95; see MISS. CODE ANN. § 2743 (1942) (Miss. courts may require surety).

[9]". . . the existence of security is neither a controlling circumstance nor an essential prerequisite to a determination of the controlling character of decedent's obligation." Newman v. Burwell, 216 Cal. 608, 15 P.2d 511 (1932); Smith v. Funk, 141 Okla. 188, 284 P. 638 (1930); *see* Poland v. Poland, 63 Wash. 597, 116 P.2d (1911); West v. West, 241 Mich. 679, 217 N.W. 924 (1928).

[10]Rice v. Andrews, 217 N.Y.S. 528, 127 Misc. 826 (1926).

[11]Blades v. Szatai, 151 Md. 644, 135 A. 841, 50 A.L.R. 232 (1927). *See* Schultz v. Schultz, 66 S.W. 56 (Tex.Civ.App. 1901); *contra:* Smith v. Funk, 141 Okla. 188, 284 P. 638 (1930).

[12]Blades v. Szatai, 151 Md. 644, 135 A. 841, 50 A.L.R. 232 (1927).

[13]FLA. GEN. S. § 3201 (1920). *See* MISS. CODE ANN. § 1743 (1942); 2 VERNIER AMERICAN FAMILY LAWS 95.

[14]64 Me. 484 (1874).

[15]143 Mich. 375, 106 N.W. 1111 (1900).

cellor granting the original decree, and this court held that his personal liability terminated with his death. It appears that the public interest would have been better served had the court decreed the obligation to be a continuing liability enforceable against decedent's estate. *W. M. McGough*

LIABILITY OF CARRIERS FOR UNCHECKED BAGGAGE IN INTERSTATE COMMERCE

As plaintiff boarded an interstate bus of the defendant, the bus driver took her small bag. No baggage check was furnished. Upon arrival at the destination, plaintiff's bag was missing and was never found. Plaintiff brought suit against the bus company for $300.00, the full value of the bag and its contents. The defense offered was that the liability of defendant under its rates filed with the Interstate Commerce Commission was limited to $25.00. HELD: Limitations of liability for lost baggage under rates filed with the Interstate Commerce Commission applicable only to checked baggage. *Sayles v. Interstate Busses Corporation,* 187 Misc. 286, 66 N.Y.S.2d 377 (1946).

At common law a common carrier was an insurer and therefore responsible for all loss and damage to property intrusted to it for transportation, except such as resulted from an act of God or the public enemy.[1] Today, as a general rule, a common carrier may contract for a reasonable limitation of its common law liability for loss or damage to either freight or baggage not resulting from its own negligence or that of its servants,[2] but the mere posting of notices will not be binding upon the passenger unless he has actually assented.[3] The common law liability of a carrier may also be limited by compliance with statute.[4] In *Boston & Maine R.R. Co. v. Hooker*[5] it was held that the statute governing the filing of rates by carriers with the Interstate Commerce Commission[6] required that a baggage check be given to the passenger.

The distinction drawn in the instant case between checked and unchecked baggage relative to limited liability appears to be good when tested by those cases involving innkeepers who fail to comply with statutes requiring the keeping of an iron safe for the safe keeping of guest's property.[7] The result reached in the instant case is further substantiated by a recent Oklahoma case[8] involving practically the same facts. It is thus submitted that in view of the cases just cited allowing limited liability when the carrier has complied with the statute, it likewise would appear both logical and just that limited liability ought to be denied when the carrier has failed to comply with the statute requiring a baggage check be furnished the passenger. *William S. Turner*

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[1]Powell v. Mills, 30 Miss. 231 (1855); Gilmore v. Carman, 1 Smedes & M. (9 Miss.) 279 (1943).

[2]Saunders v. Southern Railway Co., 128 F. 15, 62 C.C.A. 523 (1904).

[3]Mobile & Ohio Railway Co. v. Weiner, 49 Miss. 725 (1874).

[4]MISS. CODE ANN. § 7637 (1942); 49 USCA § 20 (11), (12) (1929); Campbell v. Tri-State Transit Co., 196 Miss. 367, 17 So.2d 327 (1944); Boston & Maine R.R. Co. v. Hooker, 233 U.S. 97 (1913).

[5]233 U.S. 97 (1913).

[6]49 USCA § 20 (11), (12) (1929).

[7]Beale v. Posey, 72 Ala. 323 (1882); Lanier v. Youngblood, 73 Ala. 587 (1883); Johnston v. Mobile Hotel Co., 232 Ala. 175, 167 So. 595 (1936).

[8]Santa Fe Trail Transportation Co. v. Newlon, 195 Okla. 542, 159 P.2d 713 (1945).

LIBEL AND SLANDER—DEFAMATION BY RADIO—LIBEL NOT SLANDER

Defendant broadcast defamatory matter from a script over a large network. Plaintiff sued defendant individually for "libel or slander," alleging an uncertain amount of damage. Defendant's motion to dismiss for want of a cause of action was denied and he appealed on certified questions as to whether his acts constituted libel or slander. HELD: Libel, not slander. The defamation was not such as to constitute slander per se, and plaintiff's allegation of damages was not sufficient to constitute an allegation of special damage necessary to an action of slander. *Hartmann v. Winchell,* 73 N.E.2d 30 (N.Y. 1947).

Historically, the remedy for defamation, oral or written, was action on the case for slander.[1] Imputation of a serious crime or of a loathsome disease, and imputations which affected plaintiff in his business, trade, profession, or office, were actionable without allegation and proof of special damage. Actions for all other defamation required such allegation and proof.[2] With the advent of the printing press a criminal action for libel arose and the Court of Star Chamber applied extremely broad rules of criminal liability.[3] From this, eventually, a civil action for libel was created.

The basis of liability in all defamation actions is said to be damage from the **publication of matter** which injures the reputation and good name of the plaintiff, reduces the esteem in which he is held, and creates feelings or opinions adverse to him.[4] In slander actions, with the exception of the three cases mentioned above, plaintiff must show actual damage; but in libel actions, since permanency of form of the publication is potentially more harmful, plaintiff is not required to show damage.[5] Libel is thought more serious because it is: (1) capable of wider circulation; (2) more permanent in nature; and (3) generally thought to have been published with greater deliberation. It would seem, however, that the existence of a writing too often determines whether the defamation is libel or slander, regardless of the potentiality for harm.

In the subject case, the majority opinion[6] relied on the *existence* of a writing, citing cases holding it libel to read aloud from a writing.[7] One case was cited holding it necessary that a hearer realize that a writing existed,[8] but permanence of form was considered more important than knowledge of the existence of a writing,

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[1]Veeder, *History and Theory of Law of Defamation,* 3 Col. L. Rev. 546, 548 (1903); 8 HOLDSWORTH, HISTORY OF ENG. LAW 365-367.

[2]PROSSER, TORTS 798-805 (1941).

[3]8 HOLDSWORTH, HISTORY OF ENG. LAW 364-365.

[4]PROSSER, TORTS 777, 810 (1941).

[5]PROSSER, TORTS 793 (1941).

[6]Hartmann v. Winchell, 73 N.E.2d 30-32 (N.Y. 1947).

[7]De Libellis Famosis, 5 Co.Rep. 125a (1605); John Lamb's Case, 9 Co.Rep. 59b (1610); Forrester v. Tyrrell, 9 Times L.R. 257 (1893); McCoombs v. Tuttle, 5 Blackf., Ind. 431 (1840); Bander v. Met. Life Ins. Co., 313 Mass. 337, 47 N.E.2d 595 (1943); Peterson v. Western Union Tele. Co., 65 Minn. 18, 67 N.W. 646 (1896); Snyder v. Andrews, 6 Barb., 43 (N.Y. 1849); Adams v. Lawson, 17 Grat., 250, 94 Am.Dec. 455 (Va. 1867).

[8]Meldrum v. Australian Broadcasting Co., Vict. L.Rep. 425, 38 Argus L.Rep. 432 (1932).

and such permanence was found here.[9] The court in the instant case specifically held *visibility* or *knowledge* of a writing unnecessary, but did not decide whether remarks not read from the script would be libel or slander.

The concurring opinion[10] maintains that the existence of a writing should not be determinative in radio defamation, since the hearer may have no knowledge of that fact and since the existence or non-existence of a writing would logically make no difference. While the distinction has been that libel is permanent and visible in form, and slander spoken and transitory,[11] the real distinction is not the writing nor the permanence of form, but the mode of publication.[12] Emphasis on the mode of publication was first apparent when the printing press was invented and printing was recognized as a dangerous mode of publication. Radio is a new and more dangerous mode of publication and it should be considered in the same light.[13] "It is the function of the courts, . . . to re-examine and reapply the old rules and to give them new content in the light of underlying vital principles. . . . Another invention, another development—here the radio—invites a similar appraisal of the old rules."[14] The concurring opinion further points out that radio defamation is as potentially harmful as a publication by writing, that it is as reasonable to presume damage from publication by radio as from publication by writing, and concludes that historically, logically, and as a matter of policy, radio defamation should be libel and not slander.[15]

It is submitted that, historically, the mode of publication was the real basis for the distinction between libel and slander; that writing and printing were considered potentially more harmful than other modes of publication and permanence of form was merely one fact tending to show such potentialities; that this distinction was made when the printing press was invented as a new mode of publication. With such precedents for determining whether a new mode of publication is libel or slander, courts should classify new modes of publication according to their potentialities for harm without the aid of legislation. In view of their wide circulation and dissemination, radio, television, and modes of publication yet to be invented should be treated in the manner that radio defamation was treated in the concurring opinion of the instant case.[16]

Donald C. Cooley

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[9]Hartmann v. Winchell, 73 N.E.2d 30, 32 (N.Y. 1947).

[10]*Id.*, at 32 *et seq.*

[11]Ostrowe v. Lee, 256 N.Y. 36, 175 N.E. 505 (1931).

[12]Osborn v. Thos. Boulter and Son, 2 K.B. 226, 231, 237 (1930); Hebditch v. McIllwaine, 2 Q.B. 54, 63 L.J.Q.B. 577 (1894); Meldrum v. Australian Broadcasting Co., Vict. L.Rep. 425, 435, 438, 38 Argus L.Rep. 432 (1932); Sheffill v. Van Deusen, 13 Gray 304, 74 Am.Dec. 632 (Mass. 1859); SALMOND, TORTS 387, 388 (10th ed. 1945).

[13]Jones v. Jones, 2 A.C. 481 (1916); Youssoupoff v. Metro-Goldwyn-Mayer Pictures, 50 Times L.R. 681, 99 A.L.R. 864 (1934); Brown v. Paramount-Publix Corp., 240 App.Div. 520, 270 N.Y.S. 544 (1934).

[14]Hartmann v. Winchell, 73 N.E.2d 34 (N.Y. 1947).

[15]Pollard v. Lyon, 91 U.S. 225 (1875); Ratcliffe v. Evans, L.R. 2 Q.B. 524 (1892).

[16]Cases in which radio stations and broadcasting corporations are joined in the action are not considered here, but see: Coffey v. Midland Broadcasting Co., 8 F.Supp. 889 (W.D.Mo. 1934); Sorensen v. Wood, 123 Neb. 348, 243 N.W.2d 82 (1932); Miles v. Louis Wasmer, Inc., 172 Wash. 466, 20 P.2d 847 (1933).

LIBEL OF PUBLIC OFFICIAL—IMPUTATION OF LAX LAW ENFORCEMENT TO GOVERNOR IN MAGAZINE EDITORIAL

Governor of Florida sued publisher of *Collier's* magazine for libel in editorial imputing lax attitude on law enforcement to governor in connection with killing of Negro. Complaint was that facts published implied governor condoned the killing. District court dismissed complaint on ground that case of libel was not stated. HELD: Cause of action for libel was alleged. Statements would prejudice plaintiff in his office because state constitution makes it his duty to enforce laws and guarantees accused trial by jury. *Caldwell v. Crowell-Collier Pub. Co.*, 161 F.2d 333 (C.C.A. 5th 1947); *cert. denied*, 68 S.Ct. 74 (1947).

The purpose of this comment will be to discuss what types of publications have been held libelous of public officials and what have been held not libelous. Among those in the former class is a charge that a Congressman falsified public documents.[1] Want of fidelity to public trust and intellectual dishonesty were the defamatory qualities said to be imputed to plaintiff. Likewise, to accuse a state adjutant general of sedition was held libelous, the court saying the tendency of such a statement would be to hold the officer up to hatred, scorn, and contempt.[2]

Other accusations have been held actionable which stated that: motives of a state attorney general were questionable,[3] a state legislator denounced the medical profession,[4] and an assistant county enginer was "cashiered."[5] Similar results were reached where the statements complained of were that: a policeman was drunk at roll call,[6] a mayor was an imp of the devil and cowardly snail,[7] and the blood of a victim was on a judge because, by granting a continuance, he gave a criminal opportunity to commit murder.[8]

Passing to decisions holding the matter there in issue not libelous, the Iowa Supreme Court in *Salinger v. Des Moines Capital*[9] held that statements that plaintiff-supreme court justice advocated creation of additional judgeship because court had too much work did not create liability. In the same case a charge that the plaintiff accepted government sleeping accommodations to which he was not entitled was not considered actionable, since it alleged only a violation of good taste and self-respect. Words to the effect that decisions of the supreme court were those of one judge were held to present a jury question as to whether the language would be understood to impute a violation of duty.

"Not libelous" was the decision of the court in these cases also, where the averment allegedly defamatory was that: a Congressman voted against wishes of

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[1]Tawney v. Simonson, Whitcomb & Hurley Co., 109 Minn. 341, 124 N.W. 229, 27 L.R.A.(N.S.) 1035, 1039 (1909).
[2]Arizona Pub. Co. v. Harris, 20 Ariz. 446, 181 P. 373 (1919).
[3]A. H. Belo & Co. v. Looney, 112 Tex. 160, 247 S.W. 777, 784 (1922).
[4]Jenkins v. Taylor, 4 S.W.2d 656 (1928).
[5]Metropolis Co. v. Croasdell, 199 So. 568, 569 (Fla. 1941).
[6]O'Brien v. Times Pub. Co., 21 R.I. 256, 43 A. 101 (1899).
[7]Price v. Whitely, 50 Mo. 439 (1872). It is interesting to note that one of the defenses was truth.
[8]Westropp v. E. W. Scripps Co., 74 N.E.2d 340, 345 (Ohio, 1947).
[9]Salinger v. Des Moines Capital, 206 Iowa 592, 217 N.W. 555 (1928).

his constituents,[10] surety for justice of peace petitioned to be relieved because he anticipated loss,[11] police chief failed to cooperate with citizens' committee,[12] and Congressman opposed appointee for Federal district judgeship because he was Jewish.[13]

Publications have been deemed libelous which courts found ascribed to plaintiff these qualities: want of integrity,[14] immorality,[15] inability,[16] and lack of courage.[17] Statements are defamatory also which hold plaintiff up to contempt,[18] hatred,[19] censure or reprimand,[20] ridicule,[21] induce an evil opinion of him,[22] or injure his reputation.[23] Courts have found that misconduct in office,[24] conduct impairing fitness for office,[25] fraud,[26] unfitness for office,[27] and implication in scandal,[28] when falsely charged, are libelous. Words tending to deprive the person of whom they are spoken of the confidence, friendly intercourse, and society of "right-thinking persons" have been characterized as defaming,[29] as have statements which blacken the memory of the dead.[30] In the case of *Tawney v. Simonson*[31] the judges

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[10]Hall v. Binghamton Press Co., 263 App.Div. 403, 33 N.Y.Supp.2d 840, 847 (1942); *aff'd*, 296 N.Y. 714, 70 N.E.2d 537 (1946) The decision was three to two in the Appellate Division.

[11]Morehead v. United States Fidelity & Guaranty Co., 187 Miss. 55, 192 So. 300, 302 (1939). The petition for relief on the bond followed the statutory form.

[12]Dawson v. Baxter, 131 N.C. 65, 42 S.E. 456, 458 (1902).

[13]Sweeney v. Newspaper Printing Corporation, 177 Tenn. 196, 147 S.W.2d 406 (1941); Sweeney v. Patterson, 128 F.2d 457 (App.D.C. 1942); *cert. denied*, 317 U.S. 678 (1942); Sweeney v. Caller-Times Pub. Co., 41 F.Supp. 163 (S.D. Tex. 1941). In the latter case, at page 167, the court said that, *since the plaintiff had no duty* in regard to the appointment, a statement that he opposed it because of the race, religion, or place of birth of the applicant is not libelous. *Contra:* 122 F.2d 288 (C.C.A. 2nd, N.Y., 1941); *aff'd*, 316 U.S. 642 (1942). The court divided two to one in this case, the majority saying: "In places where Jews make up a sizeable portion of the population, . . . it may be taken for granted that there will be an appreciable number who will hate or hold in contempt one who discriminates against a Jew." The Supreme Court voted four-four in affirmance.

[14]Tawney v. Simonson, Whitcomb, & Hurley Co., *supra*, note 1; Westropp v. E. W. Scripps Co., *supra*, note 8; Salinger v. Des Moines Capital, *supra*, note 9.

[15]See Dawson v. Baxter, *supra*, note 12.

[16]*Ibid.*

[17]Price v. Whitely, *supra*, note 7.

[18]Tawney v. Simonson, Whitcomb & Hurley Co., *supra*, note 1; Arizona Pub. Co. v. Harris, *supra*, note 2; Price v. Whitely, *supra*, note 7. *Contra:* Salinger v. Des Moines Capital, *supra*, note 9.

[19]Arizona Pub. Co. v. Harris, *supra*, note 2; Price v. Whitely, *supra*, note 7.

[20]Jenkins v. Taylor, *supra*, note 4.

[21]Price v. Whitely, *supra*, note 7. *Also see* Hall v. Binghamton Press Co., *supra*, note 10; and Dawson v. Baxter, *supra*, note 12. *Contra:* Salinger v. Des Moines Capital, *supra*, note 9.

[22]Arizona Pub. Co. v. Harris, *supra*, note 2. *See* Hall v. Binghamton Press Co., *supra*, note 10.

[23]Price v. Whitely, *supra*, note 7. *Also see* Dawson v. Baxter, *supra*, note 12.

[24]Tawney v. Simonson, Whitcomb & Hurley Co., *supra*, note 1; Westropp v. E .W. Scripps Co., *supra*, note 8.

[25]Jenkins v. Taylor, *supra*, note 4.

[26]See Westropp v. E. W. Scripps Co., *supra*, note 8.

[27]Westropp v. E. W. Scripps Co., *supra*, note 8.

[28]Dawson v. Baxter, *supra*, note 12.

[29]Hall v. Binghamton Press Co., *supra*, note 10.

[30]See Price v. Whitely, *supra*, note 7.

[31]*Supra*, note 1.

said that in order to constitute libel of a public officer a statement must be such as, if true, would subject him to removal from office.

On the other hand, courts have said that assertions which simply accuse plaintiff of greed[32] or provoke him to wrath[33] are not libelous. Similarly, it has been decided in the Federal case of *Sweeney v. Patterson* that erroneous and injurious statements of fact and injurious comment or opinion do not result in liability, where no charge of crime, corruption, or gross immorality or incompetence is made.[34] One court, in holding the matter complained of not libelous, felt that a factor to be considered was the fact that "the 'ordinary reader' of the defendant . . . probably never heard of" the plaintiff.[35]

Thus, it seems that, in general, the same types of statements are held libelous in cases involving public officials as in cases of private citizens . The main distinction in the two classes of cases, of course, is in the fact that privilege is sometimes a defense to actions brought by officials.

Fred Witty

MINES AND MINERALS—A MINERAL CONVEYANCE MADE SUBJECT TO EXISTING LEASES WILL BE SUBSERVIENT TO VALID UNRECORDED LEASES

Plaintiff brought suit to quiet title to an undivided three-fourths interest in oil, gas and other minerals, having purchased such interest through a lease from one Taylor, dated October 8, 1943. This lease was not immediately recorded. Defendant claims one-half of the same undivided three-fourths interest by virtue of a conveyance from the same grantor, dated October 11, 1943. The conveyance to defendant contained a provision that "This conveyance is made subject to any valid and subsisting oil, gas or other mineral lease or leases on said land, . . . but grantor [does sell unto grantee] all the rights, rentals, royalties and other benefits to accrue under said lease or leases." Defendant claims as a purchaser for value without actual or recorded notice of a prior subsisting lease. HELD: The recording statutes are inapplicable where a grantee accepts a conveyance which is expressly made subject to any valid and subsisting lease. *Gulf Refining Company v. Harrison,* 30 So.2d 44 (Miss. 1947).

Before the advent of recording statutes, the common law rule was that the interest which a grantor conveys to his grantee could not be affected by a subsequent purported conveyance of that interest by the same grantor to another.[1] The conveyance of the interest in the first instance left no part of the interest in the grantor which he might convey to another. Notice, or lack of notice, of the first conveyance was of no significance at common law.[2]

The recording acts, which exist in all states,[3] have changed the common law rule by providing that instruments affecting title to land, unless filed for record,

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[32]Hall v. Binghamton Press Co., *supra,* note 10. "There is greed other than that which advances personal fortune referred to in the complaint."

[33]Salinger v. Des Moines Capital, *supra,* note 9.

[34]Sweeney v. Patterson, *supra,* note 13.

[35]Sweeney v. Caller-Times Pub. Co., *supra,* note 13.

[1]Aigler, *The Operation of the Recording Acts,* 22 MICH. L. REV. 405 (1924).

[2]BURBY, HANDBOOK OF THE LAW OF REAL PROPERTY § 280 (1943).

[3]Title and Document Restoration Co. v. Kerrigan, 150 Cal. 289, 88 P. 356 (1906). For an historical discussion of the American statutes, see Beale, *The*

shall be invalid as against a subsequent bona fide purchaser without notice. The operative purpose of the recording of a conveyance is to give constructive notice to subsequent purchasers.[4] Hence, the construction placed by the courts upon the recording statutes has the effect of making the recording of the conveyance equivalent to notice to any subsequent purchaser of the existence and contents of the instrument recorded, irrespective of whether he actually obtains such information from the records.[5]

The courts are unanimous in holding, however, that subsequent purchasers, who have *actual* notice of a prior *unrecorded* conveyance, acquire their rights in subordination to the unrecorded conveyance.[6] In short, it is held that one who has *actual* notice cannot hope to have his interest protected merely because he does not have *constructive* (or record) notice, also.

In all jurisdictions which have dealt with the question, it has been held that oil and gas leases are conveyances affecting the title to land within the provisions of the recording acts.[7] In one state,[8] oil and gas leases are named in a special recording act. In other jurisdictions, either by express decisions of the courts, or by inference from decided cases dealing with the subject of priorities, it is clearly indicated that oil and gas leases are considered as interests in land within the provisions of the recording acts.[9] The Mississippi Supreme Court has indicated in re-

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Origin of the System of Recording Deeds in America, 19 GREEN BAG 335 (1907); Haskins, *The Beginnings of the Recording System in Massachusetts,* 21 B. U. L. REV. 281 (1941).

[4]Constructive notice has been defined as "That which the law attributes to a person of things which he knows, or ought to know, or which, by using ordinary diligence, he might know." Hence, the design of the registration acts is to afford a convenient means of giving knowledge of the contents of prior conveyances affecting the title to real property. DELVIN, THE LAW OF REAL PROPERTY AND DEEDS § 728, pp. 1351, 1352 (1911).

[5]2 POMEROY, EQ. JUR. § 649 (1941).

[6]Sanford v. Eastabutchie Lumber Co., 83 Miss. 478, 36 So. 10 (1903); Ladnier v. Stewart, 38 So. 748 (Miss. 1945). One having actual notice is bound thereby: Lowry v. McDaniel, 58 Tex. Civ. App. 424, 124 S.W. 710 (1910).

[7]4 SUMMERS, THE LAW OF OIL AND GAS § 231 (Perm. ed. 1938).

[8]OHIO GEN. CODE §§ 8518, 8519 (1888). See Northwestern Oil Natural Gas Co. v. Tiffin, 59 Ohio St. 420, 54 N.E. 77 (1899), and Keystone Bank of Pittsburgh v. Union Oil Co., 25 Ohio St. 464 (1903), where this statute was applied. In at least one state, oil and gas leases are expressly named in the general recording act. CARROLL'S KY. STAT. § 494 (1930). The application of the Kentucky statute is illustrated in Coffee v. Bushong, 230 Ky. 154, 18 S.W.2d 973 (1929) and Pelphrey v. Lemaster, 240 Ky. 759, 43 S.W.2d 29 (1931).

[9]In Derby Oil Co. v. Bell, 134 Kan. 489, 7 P.2d 39 (1931), the court held oil and gas leases within the general recording act of Kansas. In some jurisdictions there are numerous cases holding that an oil and gas lease creates an interest in land, and is thus within the purview of the recording acts. Then there are other decisions dealing with oil and gas leases just as if they were within the recording acts, but without expressly so stating. Some cases of the latter type are: Brandt v. Roxana Petroleum Corp., 29 F.2d 980 (C.C.A. 5th 1929); Henry v. Gulf Refining Co., 179 Ark. 138, 15 S.W.2d 979 (1929); Callahan v. Martin, 3 Cal.2d 110, 43 P.2d 788 (1935); Exchange National Bank v. Head, 155 La. 309, 99 So. 272 (1924); Glasco v. Akin, 143 Okla. 38, 287 P. 390 (1930); Luckel v. Barnsdall Oil Co., 74 S.W.2d 127 (Tex. Civ. App. 1934); Heck v. Morgan, 88 W.Va. 102, 106 S.E. 413 (1921).

cent holdings that oil and gas leases create a determinable fee estate in land.[10] Hence, the Mississippi court should have no difficulty in concluding that oil and gas leases come within the provisions of the state recording acts.[11]

Since an oil and gas lease is an instrument affecting the title to land within the meaning of the recording acts, the same principles relative to notice imparted by recordation and the position of a subsequent purchaser for value without notice which are applied to other instruments affecting title to land are applicable to oil and gas leases. Hence, if the oil and gas lessee has actual knowledge or notice of a prior valid unrecorded lease, he takes his interest subject to the provisions of the prior lease.[12] What is actual knowledge or notice has been variously stated.[13] The general rule, however, seems to be that whatever is notice sufficient to excite attention and put a party on guard and call for inquiry is actual notice of everything to which such inquiry might lead.[14] When a person has sufficient information to lead him to a certain fact he shall be said to have notice of such fact.[15] A purchaser of real property is said to have constructive notice of all matters affecting his estate or interest which are expressly set forth or even suggested by way of recital in his instrument of conveyance.[16]

Hence, it is the general rule that a purchaser will not be protected against express provisions appearing in the lease. Consequently, if any infirmities of title appear in the subsequent lessee's instrument, apparent on the face of such instrument, he has notice.[17]

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[10]Stokely v. State *ex rel.* Knox, 149 Miss. 435, 115 So. 563 (1928); Pace v. State *ex rel.* Rice, 191 Miss. 780, 4 So.2d 270 (1941); Lloyd's Estate v. Mullen Tractor Co., 192 Miss. 62, 4 So.2d 282 (1941); Koenig v. Calcote, 199 Miss. 435, 25 So.2d 763 (1946). For an excellent summary of the above cited cases in respect to the nature of the lessee's interest in an oil and gas lease in Mississippi, *See* Wade, *Recent Mississippi Oil and Gas Cases,* 18 Miss.L.J. 243 (1947).

[11]Miss. Code Ann. §§ 867, 868, 869 (1942).

[12]See note 9 *supra.*

[13]"Whenever, from competent evidence, either direct or circumstantial, the court or jury is entitled to infer, *as a conclusion of fact, and not by means of any legal presumptions,* that the information was personally received by a party, the notice is actual." 2 Pomeroy Eq. Jur. § 595. "It would seem that one might properly be said to have actual notice when he has information in regard to a fact, or information as to circumstances inquiry of which would lead him to discover such a fact." 5 Tiffany, The Law of Real Property § 1284.

[14]In Gulf Refining Co. v. Travis, 29 So.2d 100 (Miss. 1947), *sug. error overr.,* 30 So.2d 398 (Miss. 1947), the Mississippi Supreme Court held that actual *possession* of the land by the lessee is sufficient notice to any prospective buyer.

[15]First National Bank of Laurel v. Johnson, 177 Miss. 634, 171 So. 11 (1936); Wetzler v. Nichols, 53 Wash. 285, 101 P. 867 (1909).

[16]"If A. is informed by the grantor, B., that the subject-matter is encumbered . . . or that he himself has not for any reason a title free and perfect, such information is actual notice; it need not state all of the particulars . . . of the conflicting interest, encumbrance or right; it is enough that A. has reasonable grounds to believe that the conflicting right exists as a fact." 2 Pomeroy, Eq. Jur. § 599 (1941).

[17]There are many cases in which a purchaser is charged with actual notice of outstanding interests because of recitals in the conveyance to him. *E.g.,* Mathis v. Hemingway, 24 F.2d 951 (C.C.A. 8th 1928); Herring v. Fitts, 43 Fla. 54, 30 So. 804 (1901); Miller v. Kemp, 157 Va. 178, 160 S.E. 203 (1931). The grantee in a second deed of trust reciting on its face that it is subject to a prior trust deed cannot successfully dispute the right of foreclosure of the first deed of trust, since

The holding of the court in the instant case that the provision in defendant's conveyance was sufficient actual notice to put defendant on inquiry as to any prior leases, whether recorded or unrecorded, is sound and just. Such a provision in an oil and gas lease is not at all unusual,[18] and should be construed as sufficient actual notice to "put a party on guard and call for inquiry."[19]

Moran M. Pope, Jr.

SPECIFIC PERFORMANCE—CONTRACT FOR SALE OF NEW AUTOMOBILE

Plaintiff entered the business establishment of defendant, a dealer and distributor of automobiles, to purchase a new car. Not having a new car on hand defendant entered into a contract with plaintiff for the delivery of a new car "as soon as possible." The contract specified the model and the price, and a cash deposit of $50.00 was made by plaintiff. From time to time over a period of fourteen months plaintiff requested delivery of the car but was refused by defendant. Plaintiff brought an action for specific performance of the contract. At the trial plaintiff showed that defendant had received, sold, and delivered to others new cars of the type contracted for by him. HELD: Plaintiff has no adequate remedy at law and is entitled to specific performance of the contract. *De Moss v. Conart Motor Sales, Inc.*, 72 N.E.2d 158 (Ct.Com. Pleas Ohio 1947).

An action for specific performance was not recognized at common law and is purely an equitable remedy.[1] A decree for specific performance is an equitable means of compelling a party to do precisely what he ought to have done without being coerced by a court.[2]

The general rule is that specific performance of contracts in relation to personal property will not be enforced, for the reason that ordinary compensation for breach of contract may be had by way of an action at law for damages.[3] However, Judge Story advanced the diametrically opposite view.[4] Although courts of equity jurisdiction have granted specific performance of contracts relating to personal property in many instances, they have not gone to the lengths advocated by Judge Story. The general rule is still followed but is subject to many exceptions

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the second grantee has full notice. *E.g.*, McEleroy v. Dishman, 225 Ala. 131, 142 So. 41 (1932); McBride v. McBride, 250 Mich. 601, 230 N.W. 933 (1930); Federal Land Band v. Pace, 87 Utah 156, 48 P.2d 480 (1935).

But the inspection of a deed charges the party with notice of those facts alone which its contents reasonably import. Cooke v. Bremond, 27 Tex. 457 (1864).

[18]GLASSMIRE, THE LAW OF OIL AND GAS 648, Forms No. 18 and 19 (1936); SUMMERS, THE LAW OF OIL AND GAS § 1466 *et seq.* (1938) (A form drawn for a term of years); THORNTON, THE LAW OF OIL AND GAS § 3113 (1939).

[19]See note 15 *supra*.

[1]Schaefer v. United Bank and Trust Co. of Calif., 104 Cal.App. 635, 286 P. 723 (1930).

[2]Municipal Gas Co. v. Lone Star Gas Co., 259 S.W. 684 (Tex.Civ.App. 1924), *aff'd*, 117 Tex. 331, 3 S.W.2d 790 (1928).

[3]Campbell v. Stiles, 300 Ky. 745, 190 S.W.2d 347 (1945); Cole v. Cole Realty Co., 169 Mich. 347, 135 N.W. 329 (1912); Hoy v. Hansborough, 1 Freem.Ch. 533, 543 (Miss. 1844). Specific performance of a contract for the purchase of a new car was denied on the theory that plaintiff had an adequate remedy at law in spite of the fact that new cars were not obtainable on the market. Kirsch v. Zubalsky, 49 A.2d 773 (N.J.Ch. 1946).

[4]2 STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 992 (14th ed. 1918).

founded on the principle of inadequacy of remedy at law.[5] The majority of the exceptions concern contracts relating to chattels which have a peculiar and unique value.[6]

In order to come within the exception to the general rule against granting specific performance of contracts relating to chattels, the complainant must show that like property cannot be purchased on the market.[7] In reality this means that the amount of damages would be extremely hard or even impossible to ascertain. This is merely another method the courts have used to say that the plaintiff has no adequate remedy at law.

In order for equity to decree specific performance there must be in existence and in effect a contract valid at law.[8] A greater degree of certainty and completeness is required for specific performance in equity than is necessary to establish a contract as the basis of an action at law for damages.[9] The Uniform Sales Act also requires that the chattel be specific or ascertained before specific performance can be granted.[10] However, some writers urge that this is not the better view.[11]

In the instant case the court held the contract to be valid and interpreted the phrase "as soon as possible" to mean within a reasonable time. The question of specific performance of contracts relating to personal property was not discussed. Although the Ohio Legislature adopted the Uniform Sales Act in 1908,[12] the court did not consider Section 68 of the Act in deciding this case.

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[5]Cochrane v. Szpakowski, 355 Pa. 357, 49 A.2d 692 (1946); Gilfallan v. Gilfallan, 168 Cal. 23, 141 P. 623, 624 (1914); Wilkins v. Somerville, 80 Vt. 48, 66 A 893 (1907); Scott v. Billgerry, 40 Miss. 119, 140 (1866).

[6]Maydon v. Weltmer, 137 Fla. 130, 187 So. 772 (1939) (heirloom); Miss. Glass Co. v. Franzen, 143 F. 501 (C.C.A. 3d 1906) (patents and copyrights); Hull v. Clark, 22 Miss. 187 (1850) (slave); Murphy v. Clark, 9 Miss. 221 (1843) (slave).

[7]Steinway v. Massey, 198 Ky. 265, 248 S.W. 884 (1923); Southern Iron and Equipment Co. v. Vaughan, 201 Ala. 356, 78 So. 212 (1918); Manton v. Ray, 18 R.I. 672, 29 A. 935 (1907) (specific performance of contract for sale of tomatoes granted); Gallagher v. Studebaker Corp., 236 Mich. 195, 210 N.W. 233 (1926) (specific performance of contract for sale of used car denied). *But cf.* Welts v. Paddock, 139 Wash. 668, 247 P. 953 (1926) (specific performance of contract for sale of used car granted without discussing the point).

[8]Duc v. Struckus, 345 Pa. 65, 26 A.2d 897 (1942); Ellis v. Treat, 236 F. 120 (C.C.A. 9th 1916).

[9]Specific performance of contract for sale of a new car was denied because contract was indefinite. Foodman v. Henry Caplan, Inc., 65 N.Y.S.2d 576 (1946); *see* Kleinschmidt v. Central Trust Co., 103 Or. 124, 203 P. 598 (1922); State Highway Comm. v. Ames, 143 Kan. 847, 57 P.2d 17 (1936).

[10]"Where the seller has broken a contract to deliver specific or ascertained goods, a court having the powers of a court of equity may, if it thinks fit, on the application of the buyer, by its judgment or decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods or payment of damages . . ." UNIFORM SALES ACT § 68.

[11]5 WILLISTON, CONTRACTS § 1419A (Rev.ed. 1937).

[12]OHIO GEN. CODE §§ 8381-8456 (Page, 1926).

It is submitted that under Section 68 of the Uniform Sales Act this was not a contract that should be specifically enforced.[13] Section 68 provides that the remedy of specific performance is available to the buyer of personal property only where the goods are *specific* or *ascertained*.[14] This was not the sale of a specific car identified and agreed upon at the time the contract to sell was made, but it is a sale by description of an unascertained car to be delivered in the future.[15]

Dudley Buford

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[13]The principal case is the only one found that granted specific performance of a contract to sell a new automobile.

Several New York cases, decided under Section 68 of the Uniform Sales Act, have denied specific performance of contracts for the sale of new automobiles on the ground that the automobiles were not specific and ascertained at the time the contract was made. Cohens v. Rosenstock Motors, Inc., 65 N.Y.S.2d 481 (1946); *accord,* Goodman v. Henry Caplan, Inc., 65 N.Y.S.2d 576 (1946); Daub v. Henry Caplan, Inc., 70 N.Y.S.2d 837 (1946).

A contract like the one in the principal case might be specifically enforced in a state that has not adopted the Uniform Sales Act. No case exactly in point was found in the Mississippi Reports. However, in *Scott v. Billgerry,* 40 Miss. 119, 140 (1866) the court by way of dictum said that it was immaterial whether there was a sale of certain specific or designated property. The controlling factor was the inadequacy of the plaintiff's remedy at law.

[14]In an earlier case the Ohio Court said that equity may decree enforcement of a contract to deliver specified and ascertained goods. Hughbanks v. Browning, 9 Ohio App. 114 (1917).

[15]Cohens v. Rosenstock Motors, Inc., 65 N.Y.S.2d 481 (1946).

BOOK REVIEW

A Declaration of Legal Faith. By Wiley Rutledge. Lawrence: The University of Kansas Press, 1947. Pp. 82, $2.00.

In 1946 Mr. Justice Rutledge delivered four addresses at the University of Kansas in inaugurating the Stephens Lectureship honoring the founder of the law school there. The Kansas Press has printed the speeches as *A Declaration of Legal Faith;* and although the author's treatment of the problems presented is necessarily abbreviated, the book makes good reading.

The author asserts his faith in the trinity of law, justice, and freedom: impalpable and thus elusive objectives, devotion to which is sneered at by the world's surplus of cynics, but objectives which are attainable by men with courage. The war made plain that the alternatives of the future are order and anarchy, but faith in the "principle of law and its universality" can ensure the right choice, if we act in time.

What steps are we to take? The author's answer is interesting. The men at Philadelphia in 1787 were confronted with the same alternatives, and they found the solution in federal union, with authority and freedom harmonized by a judicious delegation and reservation of powers. Perhaps, he says, the answer to the world's dilemma may yet be found in universal application of the federal principle.

Mr. Justice Rutledge then presents an analysis of major Supreme Court decisions interpreting the commerce clause of the Constitution, which clause to him is an inherently federal device and more concerned with reconciliation of conflict between nation and state than any other provision. As for the meaning of "commerce," Congress' tendency is obviously toward enlargement, in returning to the original broad definition laid down by Marshall in the *Gibbons* case,[1] abandoning the temporary construction enunciated by the Supreme Court in the *Knight* case[2] in 1895. The justification for the damage to states' rights? The author implies that in no other way would we have been able to meet our recurrent domestic and international crises.

In his discussion of the cases involving the negative phase of the commerce clause, the implied prohibition on state action in the absence of expression by act of Congress, Mr. Justice Rutledge concludes that the Court's tendency is to approve state regulation formerly rejected as in-

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[1]Gibbons v. Ogden, 9 Wheat. 1 (U. S. 1824).
[2]United States v. E. C. Knight Co., 156 U.S. 1 (1895).

consistent with Congress' silence, and thereby to narrow the implied prohibition, doubtless as compensation to the states for the enlargement of the affirmative phase.[3] Thus it follows that the role of the courts in both the affirmative and negative aspects of the problem is one of diminishing importance, with the judiciary intervening to set aside Congressional or state legislative judgment only in cases where there are plainly involved the evils that the clause was originally designed to prevent.

American experience with the commerce clause, then, may be studied with profit by everyone desirous of ending war. But, granted the theoretical desirability of world federal government, by exactly what procedure is it to be established? And does its institution demand relinquishment by the American people of the precious jewel we call national sovereignty? It is to be regretted that the brevity of the lectures precluded elaboration on these points.

*Huey B. Howerton, Jr.**

[3]The author cites RIBBLE, STATE AND NATIONAL POWER OVER COMMERCE (1937) and FRANKFURTER, THE COMMERCE CLAUSE (1937), where the problems he is summarizing are elaborated.

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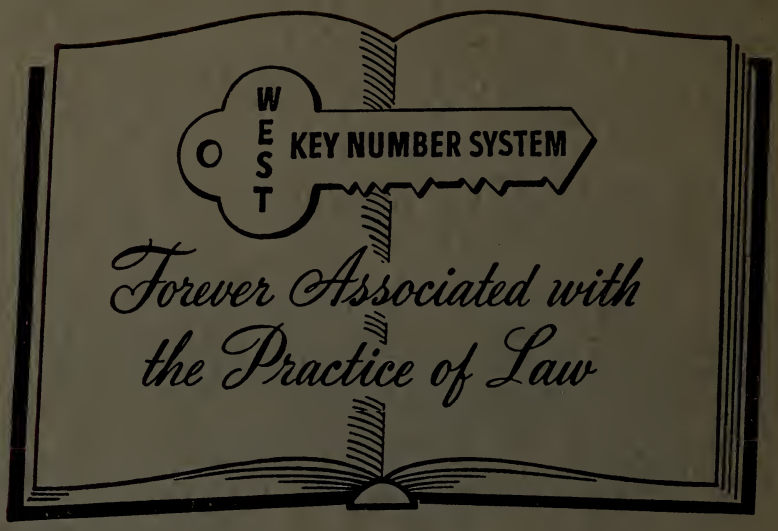
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